Supreme
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APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

O.T. 1971

NO. 70-92

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners,*

vs.

TRUCKING UNLIMITED, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed March 2, 1971
Certiorari Granted June 1, 1971

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

APPENDIX

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United States

October Term, 1970

No. 1419

California Motor Transport Co., et al., *Petitioners,*

vs.

Trucking Unlimited, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed March 2, 1971
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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February 20, 1967— Plaintiffs' first amended complaint filed in U.S. District Court for the Northern District of California.

April 17, 1967 — Motions filed by defendants to dismiss, because of failure to state a claim upon which relief can be granted, and because of applicability of doctrine of primary jurisdiction.

October 6, 1967 — Memorandum of Decision of Federal District Judge Sweigert dated October 5, 1967, dismissing complaint for failure to state an antitrust violation.

November 1, 1967— Letter of October 25, 1967 from Federal District Judge Sweigert to Mr. Khourie, stating that the October 6, 1967 Memorandum of Decision did not extend to consideration of motion to dismiss on ground of primary jurisdiction.

October 5, 1970 — Opinion and judgment of the Court of Appeals for the Ninth Circuit.

October 5, 1970 — Letter of October 5, 1970 from Clerk of the Court of Appeals for the Ninth Circuit advising of entry of judgment on that day reversing and remanding the judgment of the court below.

December 22, 1970— Order of Mr. Justice Blackmun extending time to file petition for writ of certiorari to February 18, 1971.

February 9, 1971 — Order of Mr. Justice Douglas extending time to file petition for writ of certiorari to March 4, 1971.

United States District Court
For the Northern District of California

Civil Action No. 45073

Trucking Unlimited, a corporation, Don D'Onofrio, an individual, dba Donofrio Drayage-Record Express, B. C. Lawson Drayage, Inc., a corporation, Cargo Carriers, Inc., a corporation, Meek Trucking Company, a corporation, L.D.S. Truck Lines, a corporation, G. A. Hutchinson & Son Draying, a corporation, Frank L. Nolan, Jr., an individual formerly a co-partner of Frank Nolan Drayage Co., American Transfer Co., a corporation, Coast Drayage, a corporation, Ruddway Drayage Company, a corporation, Rose J. Antonini, Virgil J. Antonini, Administrator of the Estate of Louis E. Antonini, and Virgil J. Antonini, a partnership, dba Antonini Fruit Express, Johansen's Superior Truck Line, Inc., a corporation, Pozas Bros. Trucking Co., a corporation, Plaintiffs,

vs.

California Motor Transport Co., a corporation, Delta Lines, Inc., a corporation, Di Salvo Trucking Co., a corporation, Oregon Nevada California Fast Freight, Inc., a corporation, Southern California Freight Lines, Ltd., a corporation, Pacific Intermountain Express Co., a corporation, Pacific Motor Trucking Company, a corporation, Ringsby Truck Lines, a corporation, Shippers Express Company, a corporation, Sterling Transit Company, Inc., a corporation, Valley Motor Lines, Inc., a corporation, T.I.M.E. Freight, Inc., a corporation, Walkup's Merchants Express, a corporation, Willig Freight Lines, a corporation, Garden City Transportation Co., Ltd., a corporation, California Cartage Company, Inc., a corporation, Boulevard Transportation Company, a corporation, Callison Truck Lines, Inc., a corporation, Ringsby-Pacific Truck Lines, a corporation (formerly Fortier Transportation Company), Defendants.

FIRST AMENDED COMPLAINT

(Jury Demanded)

Cause of Action of Plaintiff

B. C. LAWSON DRAYAGE, INC.

Plaintiff complains of defendants as follows:

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted, against defendants under Title 15, Section 15 and 26 U.S.C., being a part of the antitrust laws of the United States, commonly known as the Clayton Act, for violations of the Sherman Act and the Clayton Act. The purpose of this action is to obtain injunctive relief and to recover damages, as provided by law, for injuries to plaintiff's business and property within the period allowed by law, which injuries proximately resulted from defendants' violations of the antitrust laws of the United States.

2. The unlawful acts and violations of law herein described have been conceived, carried out, made effective and performed in major part within the above district and division and have affected areas elsewhere in California and in other states.

Parties

3. Plaintiff is a corporation organized and existing under the laws of the State of California.

4. Plaintiff was at all times herein mentioned a highway carrier operating pursuant to a certificate or permit duly issued by the California Public Utilities Commission (P.U.C.) and pursuant to the authority of the Interstate Commerce Commission (I.C.C.). As a highway carrier, plaintiff was at all times herein mentioned in the business

of transporting goods and packages throughout areas of California and of rendering to customers other services incidental to the actual transportation of such goods and packages.

5. The defendants are all corporations, each organized and existing under the laws of one of the states of the United States. Each defendant is found and transacts business within the above district and elsewhere in California and in some cases in other states. Each is engaged in the business of transporting goods and packages throughout areas of California and to and from other states and of rendering to customers other services incidental to the actual transportation of goods and packages.

Interstate Commerce

6. The violations herein alleged have occurred within the stream of interstate commerce and substantially, directly and adversely affect interstate commerce. All defendants are interstate instrumentalities who have improperly used their power over interstate commerce so as to adversely affect, restrict and impinge upon local commerce.

The Functions of the Regulatory Agencies as Involved in This Complaint

7. The grants of operating rights, consents to transfer rights or registrations of rights sought by plaintiff and other competitors of defendants and the filing of complaints by defendants against their competitors, as set forth in the following section entitled "The Violations", were initiated by the filing of formal applications, peti-

tions or complaints with the California P.U.C. or I.C.C. Protests or oppositions to such filings were likewise initiated by similar formal writings. The proceedings or machinery by which such applications, petitions or complaints were adjudicated were judicial in nature. Such proceedings generally involved formal filings, service of process, formal notice as regulated by statute or regulation, discovery, including the taking of depositions, issuance of subpoenas and subpoenas duces tecum in accordance with identical procedures used in the Superior Courts of California, the taking of oral or written testimony under oath, findings, conclusions, decisions and opinions, the use of precedent in the decisional processes and the making of a record of proceedings and testimony. Plaintiff and other competitors of defendants who are joined herein or who are members of the designated class do not complain of any activities of defendants or their co-conspirators toward or in reference to any function of the I.C.C. or P.U.C. except as such activities pertain to the precise proceedings before such bodies here described.

The Violations

8. On information and belief, plaintiff alleges that defendants have combined, contracted and conspired to restrain trade and commerce, have monopolized, attempted to monopolize and conspired to monopolize trade and commerce in the transportation of goods and packages in the above district and elsewhere, all in violation of Sections 1 and 2 of the Sherman Act. The violations of the Sherman Act constitute the behavior of defendants as follows:

A. Beginning in or about February 1961, and continuously thereafter, defendants and their co-conspirators, constituting the largest common carriers in the State of California and the Western United States, formed and entered into a conspiracy for the agreed aim and purpose of putting their competitors, including plaintiff, out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, and of monopolizing the highway common carriage business in California and elsewhere.

B. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have combined and committed their financial and other resources and utilized such resources to engage in the activities set forth herein.

C. In order to accomplish the purposes of the conspiracy, the defendants have agreed jointly to carry out a consistent, systematic, and uninterrupted program of instituting judicial proceedings or actions in the California Public Utilities Commission, the Interstate Commerce Commission, the Supreme Court of California, the United States District Courts, the United States Courts of Appeal, and the United States Supreme Court in opposition to, with but a few and insignificant exceptions, every request, application or action for operating rights, transfers of rights, of registrations of rights made or brought by plaintiff and other competitors of defendants before such agencies and courts. The conspiracy included the agree-

ment to seek rehearings or take appeals to and through the various levels of the courts if such proceedings were lost by defendants and their co-conspirators or to oppose rehearings or appeals taken by plaintiff and other competitors if plaintiff and other competitors lost any such proceedings. Defendants and their co-conspirators agreed to resist and oppose at all levels. The conspiracy included the agreement to jointly finance all opposition which, if such opposition were not so financed, would not have been made at all because of the great expense involved in such a program of protests.

D. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have instituted protest or opposition proceedings against plaintiff's and other competitors of defendants' applications or requests for rights, transfers of rights, and registrations of rights in the P.U.C. and I.C.C., and have filed complaint proceedings against plaintiff and other competitors of defendants in the P.U.C. Upon losing such proceedings, the defendants have filed for or sought rehearings, reviews or appeals of such decisions below, and accordingly have instituted proceedings for rehearing, review or appeal in the agencies and courts set forth herein. Upon prevailing against plaintiff and other competitors of defendants in the P.U.C. or I.C.C., the defendants have effected a joint program of resisting rehearings, reviews or appeals on the part of plaintiff and other com-

petitors of defendants in the agencies and courts set forth herein.

E. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, defendants have as a matter of policy instituted the proceedings and actions set forth herein with or without probable cause, and regardless of the merits of the cases of plaintiff and other competitors of defendants, or of the defendants' opposition.

F. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have established a trust fund to finance their conspiracy, and each defendant has contributed finances to the fund in monthly payments in amounts proportionate to each defendant's yearly gross income, regardless of whether such contributing defendant participated in or had a competitive interest in the proceedings instituted by and on behalf of the defendants' conspiracy as set forth herein.

G. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have publicized and made known to defendants' competitors, including plaintiff,

(1) That the defendants' conspiracy, with its combination of financial wealth and resources, would be used to oppose, with but a few and insignificant exceptions, all applications, requests, or actions pending on behalf of plaintiff and other competitors of defendants at the time the conspiracy com-

menced, or to be made or brought by plaintiff or other competitors of defendants at all times thereafter;

(2) That such opposition proceedings would be instituted and pursued by defendants through the judicial machinery of the agencies and courts as set forth herein; and

(3) That it would be expeditious and wise for plaintiff and other competitors of defendants to terminate, abandon or surrender existing applications, requests or actions, and to limit severely or refrain entirely from making or bringing further applications, requests or actions for rights, transfers or registrations in the agencies and courts set forth herein, lest plaintiff or such other competitors of defendants be met with the combined wealth and resources of defendants.

H. Pursuant to conspiracy, the defendants have deliberately and purposefully achieved the agreed upon aims, as follows:

(1) The defendants have depleted the resources of plaintiff and other competitors of defendants who, even where granted the rights, transfers or registrations requested, have expended the wherewithal and resources required to remain in business or to compete successfully in resisting or overcoming the defendants' conspiracy.

(2) The defendants have delayed the ultimate granting of rights, transfers or registrations

sought by plaintiff and other competitors of defendants so as to damage severely their ability to compete or remain in business even though all or part of the rights, transfers and registrations were ultimately granted.

(3) The defendants have successfully discouraged and deterred plaintiff and other competitors of defendants from initiating or pursuing requests, applications or actions for rights, transfers or registrations.

(4) The defendants have practically and actually made unavailable to plaintiff and other competitors of defendants free and unlimited access to the judicial machinery of the agencies and courts as set forth herein.

(5) The defendants have clogged and impeded the judicial machinery of the agencies and courts set forth herein, thereby denying plaintiff and other competitors of defendants free and unlimited access thereto.

(6) The defendants have harassed and obstructed plaintiff and other competitors of defendants.

(7) The defendants have harassed and obstructed the judicial machinery of the agencies and courts set forth herein.

(8) The defendants have abused the judicial machinery of the agencies and courts set forth herein.

(9) The defendants have denied to the agencies and courts the benefit of facts and informa-

tion, competently presented through established judicial procedures, upon which such agencies and courts make their decisions.

(10) The defendants, acting in concert, became capable of instituting opposition proceedings as set forth herein and have thereby defeated or restricted, in whole or in part, rights, transfers and registrations requested or applied for by plaintiff and other competitors of defendants on the basis of decisions rendered on the merits of the issues presented. Such decisions which, but for the defendants' combination and conspiracy, would not have been rendered adverse to plaintiff and other competitors of defendants, because no opposition would otherwise have been commenced.

I. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants, being possessed of monopoly power by reason of the combination of their wealth and resources, have in fact performed and done the acts, and have employed the means alleged herein.

Effect of Violations

9. By virtue of the violations of the antitrust laws on the part of defendants, competition of plaintiff and other competitors of defendants has been restrained, lessened, impaired and eliminated. The judicial machinery of the P.U.C. and I.C.C. and the courts has been effectively closed to plaintiff and other competitors of defendants.

Defendants have succeeded in defeating, delaying or restricting rights sought by plaintiff and other competitors of defendants, regardless of the merits, in situations where no protest would have been made at all except for the unlawful combination and purpose of the conspiracy and combined strength of the defendants. The defendants have, in effect, become the regulators of the grants of rights, transfers and registrations to plaintiff and other competitors of defendants rather than the P.U.C., the I.C.C. and the courts. The value of the businesses of the plaintiff and other competitors of defendants has diminished because of difficulty encountered in transferring rights to willing purchasers. As a result of the foregoing, the defendants have acquired, implemented, fostered and aggrandized their economic and monopoly power.

Damages

10. As a direct and proximate result of the violations set forth herein, the value of plaintiff's business and property has been substantially injured, its profits seriously impaired, plaintiff has been required to make extensive expenditures as a result of defendants' actions, and it has suffered a loss of value, goodwill and reputation to its business, all in an amount presently unknown to plaintiff.

Second Cause of Action of Plaintiff
B. C. LAWSON DRAYAGE, INC.

1. Plaintiff repleads the First Cause of Action with the exception of subparagraph 8A.

2. Prior to 1961, pursuant to prior decisions rendered by the P.U.C., grants of operating rights to common carriers were liberally given. Applications by truckers for

such rights were granted as a matter of course, with some of them encountering no opposition whatsoever and the remaining encountering only sporadic opposition. Also prior to 1961, defendants and other co-conspirators took full advantage of the above-described P.U.C. decisions, and to the extent that they desired them, applied for and received extensive operating rights. Also prior to 1961, applications by truckers for the transfer of rights were freely granted, with most of them encountering no opposition whatsoever, and the remaining few encountering only sporadic opposition. Beginning in 1963, the I.C.C., upon granting of applications of truckers, permitted P.U.C. operating rights to be registered as part of the interstate authority of applying truckers.

3. Beginning in or about February 1961 and continuously and uninterruptedly through the dates of the filing of the complaint and this first amended complaint, defendants and their co-conspirators combined for the agreed aims and purposes of (a) denying plaintiff and other competitors of defendants the business advantage otherwise available to them by virtue of the policy of the P.U.C.; (b) denying plaintiff and other competitors of defendants the business advantage of having their applications for rights, transfers and registrations heard and granted without enervating, ceaseless and financially debilitating opposition; (c) thwarting the policy and aims of the P.U.C. in liberally granting operating rights; (d) depriving plaintiff and other competitors of defendants of valuable operating rights by rendering such rights difficult and expensive to transfer to a buyer or register with the I.C.C.; and (e) themselves becoming,

in effect, the regulators, rather than the P.U.C., the I.C.C. and the courts, of the granting of operating rights, transfers and registrations by plaintiff and other competitors of defendants.

Causes of Action of Plaintiff
CARGO CARRIERS, INC.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is the assignee of all of the right, title and interest in the claims here asserted of B.B.S. Transportation Co., Inc.

Causes of Action of Plaintiff
L.D.S. TRUCK LINES

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
JOHANSEN'S SUPERIOR TRUCK LINE, INC.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
POZAS BROS. TRUCKING CO.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
TRUCKING UNLIMITED

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
G. A. HUTCHINSON & SON DRAYING

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is the assignee of all of the right, title and interest in the claims here asserted of G. A. Hutchinson dba G. A. Hutchinson & Son Draying.

Causes of Action of Plaintiff
DON D'ONOFRIO,
dba DONOFRIO DRAYAGE-RECORD EXPRESS

1. Plaintiff repleads the entire First Cause of Action with the exception of Paragraph 3 and the Second Cause of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is an individual doing business as Donofrio Drayage-Record Express.

Causes of Action of Plaintiff
FRANK L. NOLAN, JR.

1. Plaintiff repleads the entire First Cause of Action with the exception of Paragraph 3 and the Second Cause of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is an individual, formerly a copartner of Frank Nolan Drayage Co.

Causes of Action of Plaintiff
COAST DRAYAGE

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
AMERICAN TRANSFER CO.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
RUDDWAY DRAYAGE COMPANY

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
MEEK TRUCKING COMPANY

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is the assignee of all of the right, title and interest in the claims here asserted of W. H. Meek, Jr. dba McDermott Trucking Co.

Causes of Action of Plaintiff
ROSE J. ANTONINI, VIRGIL J. ANTONINI
and VIRGIL J. ANTONINI, Administrator

1. Plaintiff repleads the entire First Cause of Action with the exception of Paragraph 3 and the Second Cause of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiffs Rose J. Antonini, Virgil J. Antonini and Virgil J. Antonini, Administrator, are in partnership doing business as Antonini Fruit Express.

Class Action

Plaintiffs complain of defendants as follows:

1. All plaintiffs above named, acting on their own behalf and on behalf of all competitors of defendants, as hereinafter defined, similarly situated, as a class, bring this cause of action pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure for treble the amount of damages suffered by them and each member of the class as a direct result of the defendants' violations of the antitrust laws of the United States and for injunctive relief.

2. Plaintiffs are informed and believe that within the State of California there are in excess of one hundred highway carriers who have been damaged by the defendants as described herein. Such carriers are:

A. Those carriers who have been harassed and financially depleted, weakened and damaged by the conduct of defendants alleged herein;

B. Those carriers who have been harassed and financially depleted, weakened and damaged and who

have been restricted in, limited in, or precluded from extending their operating rights and capabilities by the conduct of the defendants alleged herein;

C. Those carriers who have been harassed and financially depleted, weakened and damaged and who have purchased or sold, or attempted to purchase or sell, existing carrier rights but who have been limited in, restricted from or precluded from consummating such purchases or sales because of the conduct of defendants alleged herein. The named plaintiffs and all of the above-described carriers are a class of persons herein called "competitors of defendants."

3. Because of the large number of competitors of defendants and the expense and burden to the parties and to the Court in litigating their claims separately, it is impractical to bring them all individually before the Court at this time.

4. The nature of the offenses charged and the commerce involved present substantial questions of law and fact common to the named plaintiffs and all other competitors of defendants, and the named plaintiffs fairly insure adequate representation of the interests of the entire class of competitors of defendants.

5. The named plaintiffs and the competitors of defendants, and each of them, hereby replead the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Prayer

WHEREFORE, the plaintiffs pray:

A. That the conduct of the defendants as herein alleged be adjudged and decreed to be in violation of the antitrust laws;

B. That judgment be entered against the defendants for treble the amount of damages suffered by each named plaintiff as a result of the violations of the antitrust laws alleged herein as required by Section 4 of the Clayton Act (15 U.S.C. 15).

C. That each member of the class represented by plaintiffs who has been injured by the violations of the antitrust laws alleged herein be allowed to intervene in this action either before or after trial for the purpose of proving the amount of damages suffered by it, and that judgment be entered against defendants for treble the amount of damages so proved.

D. That plaintiffs be awarded their costs of suit, including reasonable attorneys' fees, as required by Section 4 of the Clayton Act.

E. That plaintiffs have such other and further relief as the Court shall deem just and proper.

F. That the Court issue an injunction against defendants as is herein requested, and such orders as are appropriate.

A jury trial is hereby demanded.

Dated: February 16, 1967.

Broad, Busterud & Khourie,
By Michael N. Khourie,
Attorneys for Plaintiffs.

United States District Court
For the Northern District of California

No. 45073

Trucking Unlimited, et al.,
Plaintiffs,
vs.
California Motor Transport Co., et al.,
Defendants.

(1) MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED:

(2) MOTION TO DISMISS FIRST AMENDED COMPLAINT ON GROUND OF PRIMARY JURISDICTION, OR TO STAY PENDING ADMINISTRATIVE ACTION

(1) Motion to dismiss First Amended Complaint for failure to state a claim upon which relief can be granted

Come now the above-named defendants, and move the Court to dismiss the First Amended Complaint for failure to state a claim upon which relief can be granted inasmuch as all the actions complained of fall within defendants' protected right to petition governmental authorities.

Wherefore, defendants move the Court to dismiss the First Amended Complaint.

(2) Motion to dismiss First Amended Complaint on ground of primary jurisdiction, or to stay pending administrative action

Come now the above-named defendants, and move to dismiss the First Amended Complaint on the ground that the allegations therein fall within the exclusive primary jurisdiction of the Public Utilities Commission of the State of California or the exclusive primary jurisdiction of the Interstate Commerce Commission.

In the alternative the above-named defendants move this Court to stay further proceedings pending a final decision of the Public Utilities Commission of the State of California (or should a court review of such Public Utilities Commission decision be taken, pending final decision of the court of last resort reviewing such decision) respecting those allegations falling within its exclusive primary jurisdiction, and pending a final decision of the Interstate Commerce Commission (or should a court of review of such Interstate Commerce Commission decision be taken, pending final decision of the court of last resort reviewing such decision) respecting those allegations falling within the exclusive primary jurisdiction of the Interstate Commerce Commission.

Wherefore, defendants move the Court to dismiss the First Amended Complaint or in the alternative to stay proceedings in this action.

The motions herein are supported by the attached memorandum.

Dated this 17th day of April, 1967, at San Francisco, California.

Graham, James & Rolph
Boris H. Lakusta
E. Myron Bull, Jr.
Roger D. MacKenzie

Heller, Ehrman, White & McAuliffee
John MacDonald Smith, Esq.
W. D. Bensen, Jr., Esq.
By /s/ Boris H. Lakusta
Boris H. Lakusta
Attorneys for Defendants

United States District Court
Northern District of California

No. 45073

Trucking Unlimited, et al.,
Plaintiffs,
vs.
California Motor Transport Co., et al.,
Defendants.

Sweigert, J.

MEMORANDUM OF DECISION

This is a civil antitrust class action for treble damages brought under Section 4 of the Clayton Act, 15 U.S.C. § 15, by fourteen plaintiffs, each engaged in transportation of goods by motor vehicle under regulation of the California Public Utilities Commission (PUC) and the Interstate Commerce Commission (ICC), charging nineteen individually named defendants, similarly engaged and regulated, with violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

The case is before the Court on defendants' motion under Rule 12(b) (6) Fed. R. Civ. P., to dismiss the First Amended Complaint for "failure to state a claim upon which relief can be granted."

The record consists of the Complaint, the First Amended Complaint and the pending motion. No facts beyond the pleading are presented by either party through

affidavit or otherwise except as may be hereafter specifically noted.

The First Amended Complaint alleges in substance and effect (See: First Amended Complaint, par. 8, A-I, pp. 6-13) that ever since February, 1961, defendants have conspired to put plaintiffs and their other competitors out of business and for that purpose have combined their financial and other resources to carry out a consistent, systematic and uninterrupted program of instituting through the procedural machinery of the California PUC, the ICC and of the courts, opposition to every request or application (mainly applications for certification under the public convenience and necessity provisions of the California Public Utilities Act, §§ 1061-1073) made by plaintiffs or by other competitors of defendants before such agency, and to appeal any rulings of those agencies to the courts, all "without probable cause" and "regardless of the merits of the cases the plaintiffs and defendants' other competitors or of the merits of defendants' opposition."

It is further alleged that defendants have contributed to a special trust fund for this purpose according to their respective yearly gross incomes and regardless of whether a contributor has a competitive interest in any particular request or application made by plaintiffs or other competitors; that without such an agreement to jointly finance such oppositions, such oppositions would not be made at all because of the great expense involved in such a program of protests; that, upon prevailing against plaintiffs and other competitors, defendants engage in a joint program of also resisting rehearings, reviews or

appeals sought by plaintiffs or other competitors; that defendants have made known to plaintiffs and other competitors their intended program of combined and well-financed opposition in order to induce plaintiffs and their other competitors to abandon existing applications or requests and to refrain from making further applications or requests; that defendants have thus depleted the resources of plaintiffs and other competitors expended in resisting or overcoming the defendants' conspiracy of opposition; that defendants have thereby deprived the agencies and courts of the benefit of facts and information, and that defendants have defeated applications and requests of plaintiffs and other competitors on the basis of decisions which, but for defendants' combination, would not have been rendered adversely to plaintiffs and other competitors because, absent such conspiracy of opposition, no opposition would have been made.

Defendants contend that this First Amended Complaint should be dismissed upon the ground that under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) the kind of activities alleged are immune from challenge under the antitrust laws.

We recognize, of course, that a complaint should not be dismissed under Rule 12(b) (6) Fed. R. Civ. P., for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Moore's Federal Prac.* Vol. 2A § 12.08.

Before considering the applicability of *Noerr* and *Pennington*, we point out that the First Amended Complaint

does not charge acts in restraint of trade or attempts at monopoly except in the one respect that defendants associated for the purpose of intervening in regulatory proceedings to oppose plaintiffs' applications.

There is no allegation that defendants have engaged in, or conspired to engage in, any other conduct designed to restrict the competition of plaintiffs or to monopolize the industry, e.g., rate control, restriction of service, boycott or blacklisting of plaintiffs or plaintiffs' customers or any similar conduct which might violate the antitrust laws.

Thus, plaintiffs' First Amended Complaint has been narrowly drawn to present the single question of whether defendants' association for intervention in regulatory proceedings before the PUC or the ICC—without any other alleged anti-competitive conduct—is rendered violative of the antitrust laws by reason of defendants' alleged anti-competitive purpose and intent.

As plaintiffs state in their brief, "The misuse of judicial process constitutes plaintiffs' entire factual and legal case, not an insignificant matter incidental to different facts and legal theories." (Plt. Brief filed 5/16/67; p. 42). Further, the First Amended Complaint states that "Plaintiffs, and other competitors of defendants who are joined herein or who are members of the designated class, do not complain of any activities of defendants or their conspirators toward, or in reference to, any function of the ICC or PUC *except* as such activities pertain to the precise proceedings before such bodies." (First Amended Complaint, Par. 7, p. 5).

Noerr, supra, was an action by a group of trucking companies under Section 4 of the Clayton Act for treble

damages and injunctive relief against a group of railroads alleging that the railroads had engaged a public relations firm to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business.

The trial court, disclaiming any purpose to hold illegal mere efforts on the part of the railroads to influence the passage of new legislation or the enforcement of existing law, rested its judgment against the railroads upon findings, first, that the railroads' publicity campaign, insofar as it was actually directed at lawmaking and law enforcement, was malicious in that its only purpose was to destroy the truckers as competitors and, further, was fraudulent in that it involved deceiving the lawmaking and law enforcement authorities by use of the so-called third party technique; and, secondly, that the railroads' campaign also had as an important, if not overriding purpose, the destruction of the truckers' good will among the general public and the truckers' customers, thus injuring the truckers in ways unrelated to the passage or enforcement of laws.

On appeal, the Supreme Court reversed the judgment. After stating the principle that "the Sherman Act does not prohibit two or more persons from associating together to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly", the Supreme Court held that none of the factors reflected in the trial court's findings were sufficient to remove the case from this controlling principle.

Specifically, the Supreme Court held that the fact, established by the trial court's finding, that "the railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitiors for the long distance freight business", would not "transform conduct otherwise lawful into a violation of the Sherman Act." (365 U.S. 127, at pp. 138, 139).

The Supreme Court further concluded that the use by the railroads in their campaign to influence governmental action of the so-called third party technique, involving deceptive and unethical public relations propaganda, would not constitute a violation of the Sherman Act because the Act is directed at trade restraints, not against political activity designed to influence governmental action. (365 U.S. 127, at pp. 140, 141).

The Supreme Court further at p. 144, concluded that, assuming application of the Sherman Act might be justified in situations in which a publicity campaign, ostensibly directed toward influencing governmental action, would be a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor" such was not the case before it since no one denied that the railroads were making a genuine and apparently successful effort to influence legislation and law enforcement practices.

Pennington, supra, was an action by the United Mine Workers (U.M.W.) for royalty payments. The defendants, certain coal companies, filed a cross-claim for damages alleging that the U.M.W. and certain other large coal companies had violated Sections 1 and 2 of the Sherman Act by: (1) entering into a Wage Agreement,

which was later established under the Walsh-Healy Act by the Secretary of Labor, that provided a minimum wage for employees of contractors selling coal to the T.V.A., (2) imposing this Wage Agreement on all coal companies without regard to their ability to pay, and (3) waging a destructive and collusive price-cutting campaign in the T.V.A. "spot market" (which was exempt from the Walsh-Healy order) with the purpose of eliminating the smaller companies from the market.

After a jury trial, a verdict was returned in favor of the defendants on their antitrust cross-claim against the union. The trial court set aside the antitrust verdict against the plaintiffs, but denied a union motion for judgment notwithstanding the verdict or in the alternative for a new trial—a motion based on the ground that the union was exempt from liability under the facts of the case and also upon claimed trial court errors. The Court of Appeals affirmed denial of the union's motion, holding that the union was not exempt from liability under the Sherman Act and, further, that the instructions were adequate and that the evidence was sufficient to support the verdict.

The Supreme Court agreed that the agreement between the U.M.W. and the larger coal operators was not exempt from the antitrust laws under § 20 of the Clayton Act, and § 4 of the Norris-LaGuardia Act. However, the Supreme Court went on to hold that the trial court had erroneously denied the motion of the U.M.W. for a new trial on the ground that there had been errors in the admission of evidence and in instructions, stating on pages 669 and 670:

> "We agree with the U.M.W. that both the Court of Appeals and the trial court failed to take proper account of the *Noerr* case. In approving the instructions of the trial court with regard to the approaches of the union and the operators to the Secretary of Labor and to the TVA officials, the Court of Appeals considered *Noerr* as applying *only* to conduct 'unaccompanied by a purpose or intent to further a conspiracy to violate a statute.' * * * Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, giving the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error."

The *Noerr* and *Pennington* cases establish the rule that violation of the Sherman Act cannot be predicated upon combined attempts to influence the passage of laws or attempts to influence public officials in the enforcement of laws even when the sole purpose and intent of the persons engaging in such activity is, and the result may be to destroy their competitors.

The reasons given by the Supreme Court for this rule are threefold: (1) That this type of combination is essentially dissimilar from the type of agreements traditionally condemned by the Sherman Act; (2) That holding this kind of activity subject to the sanctions of the Sherman Act would impair the power of government to act upon the basis of information provided to it by interested parties, and (3) That a construction of the Sherman Act, bringing this kind of activity within its purview,

would raise important constitutional questions, e.g., the right to petition.

Thus, the Supreme Court has in effect weighed these factors in balance with the factor of the antitrust intent or result of certain kinds of concerted activity and has concluded that the latter factor must be risked in order to subserve other governmental needs and political rights.

The *Noerr* doctrine has been recognized and applied in *United States v. Johns-Manville,* 259 F.Supp. 440 (E.D. Pa. 1966) (involving alleged combination for informal approaches to municipal authorities to obtain restrictive specifications for certain pipe with intent to injure competitors); *A.B.T. Sightseeing v. Gray Line,* 242 F.Supp. 365 (S.D.N.Y. 1965) (involving alleged combination to lobby lawmaking and administrative agencies of the City of New York with intent to ultimately eliminate competition); *Harmon v. Valley Natl. Bank,* 339 F.2d 564 (9th Cir. 1964) (involving alleged combination by defendants with the Attorney General of Arizona to commence a court action for the purpose of injuring a competitor); *Assn. of Western Ry. v. Riss,* 299 F.2d 133 (D.C. Cir. 1962) (involving an alleged combination of four Ry. Associations to influence legislative and administrative action with intent to destroy competition); and in *Baltimore & Ohio Ry. v. New York, N. H. & H. R. Co.,* 196 F.Supp. 724 (S.D.N.Y. 1961) (involving alleged combination to propagandize the ICC to impose certain rates on competitors together with the filing of a suit to obtain enforcement of the ICC rates).

In *Woods v. Aluminum Co.,* 36 F.R.D. 107 (S.D. Tex. 1963), the court refused to apply the *Noerr* doctrine on

a motion for summary judgment where the allegation was to the effect that defendants had conspired to file "false nominations" with the Texas Railroad Commission (whose regulatory Act provided that every oil producer should file monthly forecasts ("nominations") of the amount of gas that could be produced and sold from oil fields. In that case, however, the court, posing the question whether the conduct complained of was "political in nature" held that, if defendants were enjoined from conspiring to submit "false nominations" with the Railroad Commission, (there are no such charges in our pending case) they would not thereby be deprived of any constitutional right to petition or participate in the governmental process; that defendants would only be prohibited from undertaking "certain joint business behavior which would not remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr;* and, further, that, assuming plaintiff's activities were 'political' in nature, the complaint also tendered the issue (unlike the pending case) whether defendants had conspired *in other respects,* apart from the filing of false nominations, to restrain competition."

In *Harmon, supra,* a civil action brought under the antitrust laws, our Court of Appeals, reversing dismissal of the action on ground of failure to state a claim, considered an allegation to the effect that defendants had combined to induce the Attorney General of Arizona (alleged to have been a participant in the combination) to file a court suit under a state statute (authorizing the Attorney General to bring such action against building and loan associations in the event of certain irregularities

specified in the statute) which suit resulted in placing Arizona S & L Association in receivership and closing its business. In the course of the receivership plaintiffs' contractual rights, acquired in dealings with the Arizona S & L Association, had been disallowed by the state court receiver.

The court, discussing the applicability of *Noerr, supra,* (and also of *Pennington, supra,* and *Association of Western Railways v. Riss, supra)* agreed that *Noerr* would apply whether or not the proceeding brought by the Attorney General had substantive merit and, that defendants' conduct (informing the Attorney General of alleged irregularities and persuading him to take the action) "would be essentially political in nature" and immune from attack for the reasons set forth in *Noerr.*

The court held, however, that the complaint in that particular case (unlike the First Amended Complaint here) could be read as alleging defendants' joint effort to influence the Attorney General "was but one element in a larger, long continued scheme to restrain and monopolize" the financial industry, pointing out that there was nothing in the complaint which would preclude proof that the alleged conspiracy was aimed, in part, directly at the refinancing arrangements between plaintiff and the Arizona S & L Association.

In *Washington Brewers v. United States,* 137 F.2d 964, (9th Cir. 1943) a criminal prosecution against the defendants, Brewers Institute and others, for violation of the Sherman Act §§ 1 and 3, the court, although affirming the trial court's refusal to dismiss the indictment (alleging concerted fixing of prices) on demurrer, pointed out that,

insofar as the indictment charged defendants with conspiring to influence the formulation of state policy concerning liquor and with combining to police the enforcement of state laws, it charged no antitrust offense saying: "We know of no reason why brewers, like other people, may not jointly advocate state legislation thought by them to be desirable, nor why they may not single or in concert, aid the authorities *in the policing of any legislation which it is within the competency of states to adopt.*" (emphasis added).

Plaintiffs first contend that the doctrine of *Noerr* and *Pennington, supra,* is applicable only to activities directed to the legislative branch of government for the enactment of laws or to the executive branch for the enforcement of laws and that the doctrine is not applicable to activities conducted through the procedural machinery of the courts or of regulatory agencies like the California PUC or the ICC in which certain quasi judicial functions are vested.

Although it is true that in *Noerr* and *Pennington,* the court was speaking in terms of the "legislative" and "executive" branches of government there involved, this Court is of the opinion that the rationale of the *Noerr-Pennington* doctrine is clearly and equally applicable to activities directed to the courts or to regulatory agencies for the purpose of taking positions on points of fact or law pertinent to the regulatory acts.

The gist of the *Noerr-Pennington* doctrine is that concerted activities "conducted along lines normally accepted in our political system" are not rendered violative of the antitrust laws even though the purpose or result may be to injure a competitor.

The right of access to courts and regulatory agencies is just as much a political right as the right of access to the legislative and executive branches. In fact, the Supreme Court has expressly recognized that the right of access to judicial agencies is within the protection of the First Amendment right of petition and has held that a statute impairing such right is, therefore, unconstitutional, *NAACP v. Button,* 371 U.S. 415 at 430 (1963).

Both the ICC and PUC Acts, involved in the pending case, are framed in such manner as to invite intervention by members of the regulated industry and other interested persons in opposition to applications for certificates of the kind here involved. The regulatory agencies often encourage such intervention in order to provide them with pertinent information concerning public convenience and necessity without which these applications would be in effect mere one-sided proceedings.

It seems clear that, under the rationale of *Noerr,* the mere fact of association by defendants for the purpose of resort to the regulatory agencies of the courts in order to oppose applications by others in the manner provided by law could not be held a violation of the antitrust law—even if the intent of defendants is, or the result might be, the injury of competitors.

The Noerr Doctrine

Plaintiffs next contend that defendants' purported access to and use of the procedures of the regulatory agencies and of the courts in the exercise of their rights is mere "sham" within the meaning of that term as used by the Supreme Court in *Noerr, supra.*

However, the First Amended Complaint does not allege that all or any of the oppositions mentioned in the pleading were filed or were to be filed without probable cause. The pleading carefully refrains from charging that the oppositions were false, misleading to the agency or lacking in factual allegation and legal theory arguably relevant to the function of the regulatory agency in determining public convenience and necessity. The allegation is merely that defendants combined to file them "with or without probable cause". This allegation falls far short of charging that the oppositions would not be upon probable cause. On the contrary, it implies that all or at least some of the oppositions may have been filed *with* probable cause.

Nor does the First Amended Complaint allege that all or any of the applications made by plaintiffs (which defendants oppose) were meritorious under the applicable regulatory acts. The allegation carefully refrains from alleging that they were. Plaintiffs merely allege that defendants combined to oppose their applications "regardless of the merits of" the applications. This falls short of alleging that the applications were meritorious. On the contrary, it implies that all or at least some might be without merit.

Plaintiffs, themselves, in their Brief filed 5/16/67, p. 8, present certain exhibits showing that 21 out of 40 matters which had reached the decision stage as of 11/28/61, resulted in action favorable to defendants either because the opposed application was denied by the agency in whole or in part or substantially reduced in scope or because the application was dismissed by the applicant after defendants appeared in opposition.

In the light of the pleading, considered either alone or in the light of such exhibit, and in a light most favorable to plaintiffs, it is impossible for this Court to say that the pleading supports plaintiffs' conclusionary claim of "sham" as that term was used in *Noerr*.

On the contrary, just as the findings in *Noerr* negatived the theory of sham, so also the allegations here negative that theory and show, as in *Noerr*, that, whatever the ultimate purpose and intent of defendants may have been, the oppositions were not, so far as the pleading is concerned, sham but were genuine and in part successful.

To hold that this complaint alleges an antitrust violation would be to hold in effect that defendants are liable in damages for having associated to present their oppositions to the agencies regardless of the merit of the oppositions or lack of merit in the applications opposed—solely because defendants, according to the complaint, entertained an ulterior motive of injuring or destroying defendants' competition.

Whatever the law would be without *Noerr*, the Supreme Court has resolved the problem of bad purpose or intent *vis a vis* freedom of resort to public officials and agencies by holding that the latter is to be subserved notwithstanding the risk of tolerating an anti-competition purpose of such resort and a possible anti-competitive result.

There is no good reason why regulated business firms may not freely submit their information and views on public convenience and necessity to the regulatory agency without subjecting themselves to antitrust attack upon the ground that their purpose was to restrict competition —an objective which may be easily implied because it is

inherently involved in the regulatory act, itself, which is designed to restrict entries into the industry to those justified by findings of public convenience and necessity. In our opinion, the rationale of *Noerr* is such that this result is not required.

As impliedly recognized in Noerr, the "probable cause" or "merit" of such applications or oppositions as are presented to the regulatory agency (or to the legislative or other executive officials) can be left to their responsible expertise (and appropriate judicial review) rather than be presented to the courts in the guise of an antitrust suit.

The gist of plaintiffs' complaints is that the resort of defendants to the regulatory agencies to oppose and thereby put plaintiffs to the proof in support of their applications has made it "exceedingly expensive" for plaintiffs and others to obtain certificates.

Unfortunately, proceedings before courts or regulatory agencies, if opposed, entail expense in terms of time and money for both sides. But, this is inherent—so much so that, as plaintiffs say in their own brief, "Individually, the members of the Dwyer group" (defendants) "would not take the action against plaintiffs which their conspiracy has allowed them to take" (Plt. Brief of 5/16/67, p. 6, line 6) and in their Amended Complaint they make the significant statement that decisions of the agency "but for defendants' combination and conspiracy, would not have been rendered *adverse* to plaintiffs and other competitors of defendants, *because no opposition would otherwise have been commenced.*" (Amended Complaint, par. 8(4)10, p. 12). (emphasis added).

The Patent Cases

Plaintiffs mainly rely upon cases involving the claim that combinations involving the threat or actual commencement of patent infringement suits were violations of the antitrust laws.

In *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963) the United States sued to restrain Singer, the sole American manufacturer of certain sewing machines, from conspiring with two of its competitors, an Italian manufacturer (Vigorelli) and a Swiss manufacturer (Gegauf) to restrain interstate and foreign trade in sewing machines, specifically certain Japanese competition.

The District Court ruled for defendants on the ground that there did not appear to be a concert between Singer and its alleged co-conspirators to restrain the Japanese competition and that Singer was merely acting within its right to protect its own patent. The Supreme Court reversed, holding that, according to its interpretation of the trial court's findings, a conspiracy to exclude Japanese competition in violation of the Sherman Act was shown.

The findings were to the effect that defendants had combined (1) to withdraw opposition to each other's applications in the Patent Office in order to secure broad claims regardless of validity; (2) to cross-license and assign their respective patents on a world-wide royalty free basis, and (3) assignment of an American patent (owned by the Swiss manufacturer [Gegauf] in order that this patent could be more effectivel enforced by Singer in the United States against the Japanese competition through infringement suits and certain Tariff Commission proceedings.

The Court said:

> "Thus, by entwining itself with Gegauf and Vigorelli in such a program Singer went far beyond its claimed purpose of protecting its own 401 machine—it was protecting Gegauf and Vigorelli, the sole licensees of the patent at the time, under the same umbrella. This the Sherman Act will not permit. * * * The fact that the enforcement plan likewise served Singer is of no consequence, the controlling factor being the overall common design, i.e., to destroy the Japanese sale of sewing machines in the United States by placing the patent in Singer's hands the better to achieve this result. It is this concerted action to restrain trade that condemns the transaction under the Sherman Act. * * * It is well settled that 'beyond the limited monopoly which is granted, the arrangements under which the patent is utilized are subject to general law. * * * By aggregating patents in one control the holder of the patents cannot escape the prohibitions of the Sherman Act. That Act imposes strict limitations on the concerted activities in which patent owners may lawfully engage."

In *Kobe v. Dempsey Pump Co.*, 198 F.2d 416 (10th Cir. 1952), an action for patent infringement, defendants counter-claimed alleging that plaintiff's misuse of its patent monopoly, including, among other things, the bringing of an infringement suit, violated Sections 1 and 2 of the Sherman Act.

Affirming a judgment for defendants on their antitrust counterclaim, the Court, dealing with plaintiff's contention that its monopolistic practices did not reach the defendants until the commencement of the infringement suit and that to allow recovery of damages would be a denial of

free access to the courts, recognized that although free and unrestricted access to the courts should not be denied or imperiled in any manner, the courts should not be made a vehicle for maintaining and carrying out an unlawful monopoly having for its purpose the elimination and prevention of competition, adding, however, on p. 425:

> "We have no doubt that, *if there was nothing more than the bringing of the infringement action* (emphasis added) resulting damages could not be recovered, but that is not the case. The facts as hereinbefore detailed are sufficient to support a finding that, although Kobe (plaintiff) believed some of its patents were infringed, the real purpose of the infringement action . . . was to *further the existing monopoly* (emphasis added) and to eliminate Dempsey as a competitor. The infringement action and the related activities, of course, in themselves were not unlawful, and *standing alone would not be sufficient to sustain a claim for damages* (emphasis added) which they may have caused, but *when considered with the entire monopolistic scheme which preceded them,* (emphasis added) we think, as the trial court did, that they may be considered as having been done to give effect to the unlawful scheme. . . ." distinguishing *Virtue v. Creamery Package Co.,* 227 U.S. 8 (1913) and *International Visable Systems v. Remington Rand,* 65 F.2d 540 (6th Cir. 1933) as involving "single and isolated actions not preceded by a long history of unlawful monopolization," 198 F.2d 416, at 425.

In *Lynch v. Magnavox,* 94 F.2d 883, 888-890 (9th Cir. 1938), the Court reversed a dismissal on demurrer of an antitrust complaint which alleged that defendants, who had cross-licensed their respective patents, had combined

to restrain competition and to monopolize the radio speaker business by threatening rádio manufacturers with a ruinous commercial campaign of letter writing and by threatening and commencing in bad faith groundless actions against the manufacturers and their customers for infringement of their allegedly invalid patents in order to force the manufacturers to discontinue purchase of radio speakers from anyone but defendants.

The Court held that, assuming each of the alleged acts to be lawful in themselves, the combination would be a violation of the antitrust laws if its purpose was to restrain competition or to attempt monopoly, saying: "In other words, if the purpose of the plan is to effect a monopoly or to fix prices . . . then the act is violated by use of any means to that end, *including a cross-licensing agreement.*" (emphasis added).

The theory of these cases, as set forth in *Mercoid v. Mid-Continent,* 320 U.S. 661, 665-666 (1943), is that a patentee has been given a privilege of limited monopoly conditioned, however, by a public purpose; that, although he may enforce his patent rights (either directly obtained or acquired from others under assignment or license), he may not use his limited monopoly in such manner as enables him to acquire a broader monopoly than is within the strictly confined and precise terms of his patent grant; that the method by which his monopoly is sought to be extended is immaterial and that, when the patent is thus diverted from its statutory purpose, the antitrust laws apply.

Further, in these cases the combinations involved other acts of the conspirators, e.g., illegal cross-licensing

schemes and similar activities, of which the infringement suits, or threats thereof were merely the effectuating means.

In none of these patent cases did the court hold or say that mere association for the bringing or threatening of a patent infringement suit—*without more*—is, itself, an antitrust violation merely because the associates may contemplate injury to a competitor.

On the other hand, it was early recognized in *International Visable Systems v. Remington-Rand,* 65 F.2d 540 (6th Cir. 1933) at 542, that the mere bringing of a patent infringement suit, even if alleged to have been brought maliciously and with the purpose of monopolizing an industry, does not state a violation of Section 2 of the Sherman Act (attempt to monopolize, i.e., regardless of concert of action) the Court saying:

> "The suit brought by appellee for the infringement of its patents cannot of itself be characterized as an attempt to monopolize trade or commerce. It was nothing more than a lawful method of protecting appellee's claimed monopoly under the patent laws * * * Moreover, the declaration in the petition that the suits for infringement were brought against appellant 'maliciously and without probable cause' adds nothing to the weight of the claim that the infringement suit was an attempt to monopolize trade or commerce", citing *Virtue v. Package Creamery,* 227 U.S. 8, 38 (1912).

In any event, the defendants in this pending case have not combined to bring patent infringement suits nor are they grantees of any monopoly which could possibly have been misused. They are simply certificated business enti-

ties in an industry which is competitive within a framework of regulation according to standards of public convenience and necessity.

It is, therefore, unnecessary to decide whether the patent cases indicate a special area to which the immunization doctrine of *Noerr* does not extend.

We only hold that the narrowly framed allegations of this Amended Complaint are such that the activities for which defendants have associated are and must be held immune from the antitrust laws—even though their ultimate purpose may be to reduce, injure or destroy competition.

The pleading has already been once amended and, presumably, plaintiffs have gone as far as they can truthfully go toward alleging an antitrust violation. The First Amended Complaint will, therefore, be dismissed without leave to amend subject to the condition that, if plaintiffs move for leave to amend within fifteen (15) days from the date of this order, the Court will consider whether their amended pleading is sufficient to state a claim upon which relief could be granted.

Dated: October 5th, 1967.

W. T. Sweigert,
United States District Judge

Original Filed October 6, 1967
Clerk, U.S. Dist Court, San Francisco.

United States District Court
Northern District of California

Post Office Building
San Francisco 1, California

Chambers of
William T. Sweigert
United States District Judge

October 25, 1967

Mr. Michael N. Khourie
Attorney at Law
Russ Building
235 Montgomery Street
San Francisco, California

Re: Trucking Unlimited, et al. v. California Motor Transport Co., et al., No. 45073

Dear Mr. Khourie:

On October 5, 1967, this Court issued its Memorandum of Decision in Civil No. 45073, dismissing the first amended complaint on the ground that, under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the first amended complaint failed to "state a claim upon which relief can be granted" pursuant to Fed. R. Civ. P. 12(b)(6).

Although that Memorandum deals exclusively with the applicability of the *Noerr* doctrine, it appears that there is some uncertainty with respect to whether the Court passed upon defendants' second motion to "Dismiss First Amended Complaint on Ground of Primary Jurisdiction, or to Stay Pending Administrative Action."

On page 2 of defendants' Memorandum of Points and Authorities in support of their motions, filed April 17, 1967, the defendants requested:

> "That the Motion to Dismiss for Failure to State a Cause of Action be considered First and Separately from the motions based on primary jurisdiction, and that the argument on the latter be withheld until decision on the former, so that if the Court agrees with defendants' position argument on the second motion will become unnecessary."

The Court also notes that defendants' motion to dismiss under the *Noerr* doctrine was the only motion argued during the oral presentation of this matter.

Lest there be any misunderstanding, I think it obvious that the separately made motion to dismiss on ground of primary jurisdiction *or* to stay pending administrative review was *not* considered in the October 6, 1967 Memorandum of Decision.

Sincerely,
W. T. Sweigert

cc:
Graham James & Rolph
Heller, Ehrman, White & McAuliffe
John MacDonald Smith, Esq.
W. D. Benson, Jr., Esq.

United States Court of Appeals
For The Ninth Circuit

No. 22,462

Trucking Unlimited, et al.,
Plaintiffs-Appellants,
vs.
California Motor Transport Co., et al.,
Defendants-Appellees.

[October 5, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: Hamlin and Browning, Circuit Judges,
and Pregerson,* District Judge.

Browning, Circuit Judge:

This is an action by one group of trucking companies against another seeking treble damages and injunctive relief under the Sherman and Clayton Acts, 15 U.S.C. §§ 1-27. All are common carriers regulated by the California Public Utilities Commission (PUC) and the Interstate Commerce Commission (ICC) and require licenses from these agencies to operate.

The complaint alleges a conspiracy among defendants to restrain and monopolize the highway common carriage business in California and elsewhere by a jointly financed,

*Honorable Harry Pregerson, United States District Judge, Central District of California, sitting by designation.

widely publicized program of opposing, before the two commissions and the courts, all applications by actual or potential competitors for the issuance, transfer, or registration of operating rights. The district court dismissed the action on the ground that the complaint failed to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6).[1] For the purposes of this appeal, we must accept all the allegations of the complaint as true, 2A Moore, Federal Practice ¶ 12.08, at 2266-67; and we can affirm only if "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). *See Harman v. Valley National Bank,* 339 F.2d 564, 565 (9th Cir. 1964); *Corsican Productions v. Pitchess,* 338 F.2d 441, 442 (9th Cir. 1964).

The district court held that relief was barred by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), and *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), which hold that the Sherman Act does not forbid attempts to influence the passage or enforcement of laws. We disagree for two reasons. First, concerted employment of judicial and administrative adjudicative processes as part of a scheme to restrain trade, as alleged in this complaint, is not excluded from the Sherman Act by the *Noerr-Pennington* doctrine. Second, even if the *Noerr-Pennington* rule does apply to the use of judicial and administrative adjudicative processes in a scheme to restrain trade, relief is not barred if, as alleged in this complaint,

[1]The district court's opinion is reported at 1967 Trade Cas. ¶ 72,298 (N.D. Cal. 1967).

the real purpose of defendants' joint activity was to restrain competitors directly, rather than to restrain them indirectly by inducing restrictive governmental action.

I

The *Noerr-Pennington* principle is a judicially implied exception to the general rule that an unlawful purpose may bring otherwise lawful means within the proscription of the Sherman Act. *See American Tobacco Co. v. United States,* 328 U.S. 781, 809 (1946). The exception's premise is that the responsibility for enacting or not enacting laws concerning trade restraints rests with the legislative branch of government; and, similarly, responsibility for enforcing or not enforcing those laws rests with the executive branch. *Noerr, supra,* 365 U.S. at 135-136. Hence, valid legislative or executive action that results in the restraint or monopolization of trade does not violate the Sherman Act. *United States v. Rock Royal Co-operative, Inc.,* 307 U.S. 533, 560 (1939).[2]

Attempts to influence the legislative and executive branches are also excluded from the Sherman Act because prohibiting such activity "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends

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[2]The Supreme Court has also held that the Sherman Act does not apply to valid *state* legislative or executive action since "the Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." Parker v. Brown, 317 U.S. 341, 351 (1943).

upon the ability of the people to make their wishes known to their representatives." *Noerr, supra,* 365 U.S. at 137.[3]

And the Sherman Act does not apply to efforts to influence the enactment or enforcement of laws even when those efforts are motivated by an anticompetitive purpose because "it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." *Id.* at 139.

This is a powerful argument for holding that joint efforts to influence legislative and executive action are excluded from Sherman Act liability regardless of purpose, but it does not justify immunizing agreements to utilize judicial and administrative adjudicative processes in a scheme to restrain trade. The fundamental reason for the *Noerr-Pennington* exception does not apply. It is not the function of the courts to determine whether laws restraining trade will be adopted or, having been adopted, whether they will be enforced; nor is this the function of an ad-

[3]Such efforts are the "political activity" referred to in *Noerr.* The Court proffered two additional reasons for its holding: (1) the "essential dissimilarity" between agreements traditionally condemned by the Sherman Act—price fixing, boycotts and market divisions—and agreements to solicit the passage or enforcement of laws; and (2) the important constitutional questions concerning the right to petition the government that would be raised if the Act were construed to prohibit joint solicitation of government action.

ministrative agency engaged in adjudication, as the PUC and ICC are here.[4] It would be pointless to limit the reach of the Sherman Act in order to protect the access of courts and agencies engaged in adjudicative functions to information and opinion relevant to determinations which they have no power to make.[5]

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[4]Licensing proceedings are adjudicative rather than legislative in nature. 5 U.S.C. § 551 (6)-(9). The PUC, for example, applies a standard of "public convenience and necessity," Cal. Pub. Util. Code § 1064, to the facts in each case—experience, financial ability, available equipment. *See, e.g.*, Encinal Terminals, 61 Cal. P.U.C. 807, 809-10 (1950). Davis characterizes as adjudicative "facts about the parties and their activities, businesses, and properties," 1 K. Davis, Administrative Law Treatise § 7.02, at 413 (1958), and Judge Friendly has described as judicial "the application of standards of greater or less generality to concrete cases." Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 Harv. L. Rev. 863, 874 (1962). Plaintiffs expressly excluded any PUC or ICC rule-making proceedings from the complaint.

Furthermore, beyond their efforts to influence administrative adjudicative processes, defendants allegedly pursued appeals in the courts from every adverse administrative determination. Even if the agency determinations were quasi-legislative, and thus within the *Noerr-Pennington* exception, court proceedings to review those determinations would be subject to the general strictures of the antitrust laws. *But see* Woods Exploration & Prod. Co. v. ALCOA, 284 F.Supp. 582, 594-595 (S.D. Tex. 1968).

[5]The holding in *Pennington* that it was error to instruct the jury in that case that joint "approaches" to Tennessee Valley Authority officials and to the Secretary of Labor might be illegal if accompanied by an anticompetitive purpose is not inconsistent with our conclusion that efforts to influence administrative adjudicative proceedings are not within the *Noerr-Pennington* exemption.

There is nothing to indicate that the administrative action sought to be influenced was adjudicatory; the language of the *Pennington* opinion suggests that it was not. Clearly, the decision of TVA officials to purchase their coal requirements on the open market was not adjudicatory in character. The nature of the "approach" to the Secretary of Labor is unclear. The Secretary has a good deal of discretion in determining whether to initiate proceedings under the Walsh-Healey Act to set a minimum wage in a given industry. 41 C.F.R. § 50-203.15; *see* Modley, Patton & Reilly, Problem Child Among Labor Laws—The Walsh-Healey

Accordingly, the general rule is applicable—the Sherman Act is violated by a conspiracy to unreasonably restrain or monopolize trade through the use of judicial and administrative adjudicative proceedings. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 424-425 (10th Cir. 1952); *Lynch v. Magnavox Co.*, 94 F.2d 883 (9th Cir. 1938); *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F.Supp. 199, 213-14 (D. N.J. 1951), *appeal dismissed*, 204 F.2d 230 (3d Cir. 1953).[6] *See also* Note, The Brakes Fail on the Noerr

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Act, 1963 Duke L. J. 205, 210, 221; 48 Dep't of Labor Ann. Rep. 250 (1960). If the "approaches" were to influence his exercise of that policy-making function under the Act, they were protected under *Noerr*. *See* Harman v. Valley Nat'l Bank, 339 F.2d 564, 566 (9th Cir. 1964). Moreover, even if we assume that defendants sought to influence the wage determination itself, the proceeding by which that determination is made, though including a hearing, 41 U.S.C. § 43a(b), is nonetheless rule-making and quasi-legislative in nature, *see* 5 U.S.C. § 551(4) & (5); Wirtz v. Baldor Elec. Co., 119 U.S. App. D.C. 122, 337 F.2d 518, 534 (1963), rather than adjudicative.

[6]At the very least, these decisions demonstrate that agreements to use litigation as a means to restrain trade are not "essentially dissimilar," in the *Noerr* sense, from those traditionally condemned under the Sherman Act.

They also support the proposition that, on balance, the public interest in free competition served by the condemnation of agreements to use judicial and administrative adjudicative processes for the purpose of restraining trade outweighs the resulting restraint upon first amendment rights. *See* Note, The Brakes Fail on the Noerr Doctrine, 57 Calif. L. Rev. 518, 537-40 (1969). As the court observed in Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 424 (10th Cir. 1952):

> "It is said that to allow recovery of damages resulting from the infringement action would be a denial of free and unrestricted access to the courts. We fully recognize that free and unrestricted access to the courts should not be denied or imperiled in any manner. At the same time we must not permit the courts to be a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition."

Doctrine, 57 Calif. L. Rev. 518 (1969). *But see Bracken's Shopping Center, Inc. v. Rowe,* 273 F.Supp. 606 (S.D. Ill. 1967).[7]

See also Report of the Attorney General's National Committee to Study the Antitrust Laws 248 (1955).

The overwhelming public interest in uninhibited communication between the people and their legislators and law enforcement officials that justifies immunizing joint efforts to influence those authorities from antitrust liability despite either wrongful purpose or the use of distortion and deception, does not apply to presentations to judges and administrative officials in the course of adjudicative proceedings. Unlike legislators and law enforcement officials, judicial and administrative adjudicators do not act in a representative capacity. There is a marked difference between the processes by which they arrive at decisions, the materials upon which they may properly rely, and the atmosphere consistent with effective performance of their respective functions. Sheppard v. Maxwell, 384 U.S. 333, 350-351 (1966); Bridges v. California, 314 U.S. 252, 271 (1941); Costilo, Antitrust's Newest Quagmire: The Noerr-Pennington Defense, 66 Mich. L. Rev. 333, 349 (1967); Note, The Brakes Fail on the Noerr Doctrine, 57 Calif. L. Rev. 518, 532-33 (1969); *cf.* Note, Application of the Sherman Act to Attempts to Influence Government Action, 81 Harv. L. Rev. 847, 849 (1968).

It is significant that in *NAACP v. Button,* 371 U.S. 415 (1963), a decision heavily relied upon by defendants, the Supreme Court discussed with approval cases that rely upon the actor's purpose in distinguishing the lawful and ethical from the unlawful and unethical in the area of stimulating litigation, *see* 371 U.S. at 439-441, and repeatedly noted that the NAACP acted with a lawful purpose in urging utilization of the courts. *Id.* at 429-430, 439-441. *See also* Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

[7]Other decisions are distinguishable. E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966), involved governmental rather than private action. In Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954), and Woods Exploration & Prod. Co. v. ALCOA, 284 F.Supp. 582 (S.D. Tex. 1968), the only injury alleged resulted from valid governmental action. Both of those cases as well as Association of Western Rys. v. Riss & Co., 112 U.S. App. D.C. 49, 299 F.2d 133 (1962), Schenley Indus. Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n, 272 F.Supp. 872 (D. N.J. 1967), and A.B.T. Sightseeing Tours Inc. v. Gray Line N.Y. Tours, 242 F.Supp. 365 (S.D.N.Y. 1965), appear to have involved administrative rule-making rather than adjudication. Citizens' Wholesale Supply Co. v. Snyder, 201 F. 907 (3d Cir. 1913), involved efforts to

The district court considered *Singer* and the other patent cases inapposite because they involved patent litigation[8] and because litigation was only one of several means employed in the scheme to restrain trade. The court did not explain the significance of either factor, and we do not see any.

Because the legal monopoly conferred by a patent lends itself to misuse as a means to illegally monopolize and restrain trade, it is often a significant factor in determining whether a particular course of conduct violates the Sherman Act that a patent is involved. This fact, however, has no bearing at all upon whether the *Noerr-Pennington* defense applies. That doctrine is concerned with protecting joint efforts to influence governmental action as such—the subject matter of the governmental action is beside the point. The significance of the cases cited is not that they involve the use of patent litigation to restrain trade, but that they involve the use of litigation for that purpose. They demonstrate that litigation can be an integral part of a scheme prohibited by the Sherman Act.

Pennington disposes of the second basis for distinction relied upon by the district court. If the *Noerr-Pennington* defense had applied to the use of litigation for the purpose of restraining trade, the defense would have been available whether this means was employed as part of a larger scheme or stood alone. *Pennington, supra,* 381 U.S.

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influence a local prosecutor's enforcement of an ordinance, *see* Harman v. Valley Nat'l Bank, 339 F.2d 564 (9th Cir. 1964), and there was no allegation of anticompetitive purpose.

[8]Slick Airways, *supra,* cited with approval by the Supreme Court in Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690, 707 (1962), did not involve patent litigation.

at 670. Furthermore, litigation and threats of litigation were the only means used to exclude competitors in *Walker Process*.

We conclude, therefore, that the *Noerr-Pennington* defense does not bar relief when a conspiracy to employ judicial and adjudicative processes in a scheme to restrain trade is alleged.

II

Dismissal was improper for another reason. Plaintiffs have alleged that defendants' real purpose was to restrain trade directly, rather than indirectly through the medium of governmental action. If this is true, plaintiffs may prevail under the "sham" exception to the *Noerr-Pennington* rule regardless of the status of joint approaches to adjudicative bodies under that defense.

The plaintiffs in *Noerr* contended, and the trial court found, that the defendants sought to injure plaintiffs directly by destroying their good will with the public and with their customers, thus weakening their competitive position and causing them to lose business. The Supreme Court noted that "the apparent effect of these findings is to take this case out of the category of those that involve restraints through governmental action and thus render inapplicable" the principle that efforts to induce such governmental action do not violate the Sherman Act. 365 U.S. at 142. The Supreme Court held, however, that plaintiffs' attempt to exclude their case from the latter category failed for want of evidence.

The Court pointed out that there was no finding that the defendants attempted directly to persuade anyone

not to deal with the plaintiffs. On the contrary, the evidence reflected only efforts by the defendants to influence the passage and enforcement of laws. The Supreme Court concluded, therefore, that "the findings of the District Court that the [defendants'] campaign was intended to and did in fact injure the [plaintiffs] in their relationships with the public and with their customers can mean no more than that the [plaintiffs] sustained some direct injury as an incidental effect of the [defendants'] campaign to influence governmental action and that the [defendants] were hopeful that this might happen." *Id.* at 143.

This was not enough to render defendants' publicity campaign actionable. The Court noted that whenever an attempt is made to influence legislation by such a campaign it is inevitable that some incidental injury will be visited upon the opponents, and equally inevitable that those conducting the campaign will be aware of this possibility.

On the other hand:

> "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denies that the [defendants] were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the [plaintiffs'] complaint is fully credited, as it was by the courts below, that effort

> was not only genuine but also highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case." *Id.* at 144.

The "sham" exception is derived from the basic rationale of the *Noerr-Pennington* defense: The Act does not bar legislation or law enforcement restraining trade and therefore does not bar the solicitation of such action. Conversely, if joint action is not for the purpose of restraining competition by inducing governmental action, but is rather for the purpose of imposing a direct restraint by the defendants' own conduct, the Sherman Act applies. *Cf. Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-707 (1962).

Plaintiffs assert that their proof[9] would establish such a conspiracy to impose a direct restraint under the guise of a program to induce governmental action. Briefly, they make the following allegations.

It was and is the policy of the PUC to encourage competition in the trucking industry by freely granting, and approving the transfer of, certificates of public convenience and necessity. Until 1963 it was the policy of the ICC to register any certificate issued by the PUC automatically, without further hearing.

In 1961 defendant trucking companies, the largest highway common carriers in California and the western states, undertook to lessen competition from smaller companies

[9]Some of the details recited appear in plaintiffs' briefs and are not specifically set out in the complaint. The allegations of the complaint are clearly sufficient to allow their proof.

resulting from the relatively easy access to operating rights. They decided to accomplish this objective, not by seeking to induce the PUC to change its policy, but rather by discouraging the filing of applications with the PUC and the ICC. To that end they agreed to take, and took the following steps.

They agreed to and did establish and maintain a joint trust fund by monthly contributions based upon each defendant's gross income. They informed their competitors that they would use this trust fund to finance opposition to all applications then pending or thereafter filed by their competitors with the PUC or the ICC; that each and every application would be opposed with or without probable cause, and regardless of its merits; and that in every case defendants would pursue their opposition through all stages of administrative and judicial review. Defendants told their competitors that they could avoid the expense and delay resulting from defendants' opposition only by abandoning pending applications and severely limiting or refraining entirely from filing further applications.

As a direct result of defendants' joint activities, the financial resources of plaintiffs and other competitors of the defendants were depleted; applications by plaintiffs and other competitors for the issuance, transfer, or registration of operating rights were defeated, delayed, or restricted; and plaintiffs and other competitors were deterred from instituting or pursuing such applications. Defendants' joint activities effectively foreclosed plaintiffs and other competitors from access to the PUC, the ICC, and to the courts in review proceedings; it denied

those agencies and the courts the benefit of facts and information required for the making of competent decisions; and it severely curtailed competition.

The rationale underlying the *Noerr-Pennington* defense does not dictate immunity for this alleged conspiracy. The purpose of defendants' joint activity was not to induce action by the affected governmental agencies, but to preclude it. That is hardly a "genuine" effort to influence governmental action in the *Noerr* sense. Prohibiting such joint activity under the Sherman Act would not "impair the power of government to take actions . . . that operate to restrain trade." *Noerr, supra,* 365 U.S. at 137. It would not impede "the ability of the people to make their wishes known to their representatives" in any legitimate sense, *id.;* nor "deprive the government of a valuable source of information." *Id.* at 139.

Nonetheless, the district court held the "sham" exception inapplicable because plaintiffs did not allege that the presentations which defendants made to the agencies and the courts were in themselves false, misleading, or lacking in evidentiary or legal support. But the question is whether the defendants sought to restrain competition by inducing restrictive governmental action, on the one hand; or, on the other, sought to restrain competition by the deterrent effect of their own joint activity.

That their joint activity took the form, in part, of solicitation of governmental action and that they made a genuine effort to support all protests as effectively as possible would not negate a primary purpose to restrain competition directly. The means allegedly adopted by defendants to deter agency action was to discourage the

filing of requests for such action by a jointly financed, well publicized program of opposing every application filed. Since all applications were to be opposed, it is irrelevant that a valid basis existed for opposing some applications. Nor is it relevant that the opposition was as effective as defendants could make it; mere token opposition would not have the requisite deterrent effect.

The purpose of this alleged conspiracy was to inflict injury upon competition directly by defendants' own joint activity. Inevitably, given the nature of the means employed, defendants' activity would also injure competitors indirectly by influencing rulings of the agencies and the courts. Here, however, that indirect injury is merely incidental; and its occurrence cannot justify application of the *Noerr-Pennington* defense. As a practical matter, to hold otherwise would make the "sham" exception inapplicable to any conspiracy to restrain trade cloaked with the mantle of a campaign to influence governmental action. *Cf. Noerr, supra,* 365 U.S. at 143-144.

Reversed and remanded for further proceedings.

HAMLIN, Circuit Judge, dissenting:

I respectfully dissent.

Section 1063 of the California Public Utilities Code provides that no highway common carrier may operate without a certificate from the Public Utilities Commission "declaring that the public convenience and necessity require such operation." In order to exercise its judgment implementing the broad statutory standard of "public convenience and necessity" in an individual case, the Public Utilities Commission is largely dependent upon information provided by the applicant and competing carriers. See *Peninsula Motor Express*, 49 Cal. P.U.C. 807 (1950). The activities of defendants in supplying this information to the Commission is thus lawful.

In my view, the activities of the Public Utilities Commission in the implementation of the broad statutory standard is one akin to policy making. The participation of the defendants in this policy making process, through their opposition to the grant of certificates or transfers of certificates is in my opinion protected from Sherman Act liability by the decisions of the United States Supreme Court in *Noerr* and *Pennington*, despite the assumption, arising from the posture of this case, that defendants have an anti-competitive motive. The Public Utilities Commission has the power and ability to correct any abuses flowing from the activities of defendants through their opposition to the grant or transfer of certificates, see California Public Utilities Code §§1062, 1064, and I think that the plaintiffs must look to the Commission, rather than to the Sherman Act, for their remedy. See *George R. Whitten, Jr., Inc. v. Paddock Pool*

Builders, Inc., 424 F.2d 25, 30 (1st Cir. 1970). See generally, Note, Application of the Sherman Act to Attempts to Influence Government Action, 81 Harv. L. Rev. 847 (1968).

For these reasons, and for the reasons stated by Judge Sweigert in his United States District Court decision, reported in 1967 Trade Cases ¶ 72,298 (N.D.Cal. 1967), I would affirm.

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

October 5, 1970

Re: No. 22462, Trucking Unlimited, et al. v.
California Motor Transport Co., et al.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered reversing and remanding the judgment or order of the court below (or administrative agency). You have 14 days from this date to file a petition for rehearing if you wish to do so.

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,
Wm. B. Luck,
Clerk of Court

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1970

Trucking Unlimited, et al., Petitioners,

vs.

California Motor Transport Co., et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s).

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 18, 1971.

Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 22nd day of December, 1970.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1970

California Motor Transport Co., et al., Petitioners,

vs.

Trucking Unlimited, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s).

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including March 4, 1971.

W. O. Douglas
Associate Justice of the Supreme
Court of the United States

Dated this 9th day of February, 1971.

SUPR[illegible]

[illegible] 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 70-92

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners,*

vs.

TRUCKING UNLIMITED, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

CALIFORNIA MOTOR TRANSPORT CO., et al.,
Petitioners,

vs.

TRUCKING UNLIMITED, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 5, 1970.

Petitioners are the corporations named in Footnote 1 and respondents are the corporations, partnerships, or

[1]California Motor Transport Co.; Delta Lines, Inc.; Di Salvo Trucking Co.; Oregon Nevada California Fast Freight, Inc.; Southern California Freight Lines, Ltd.; Pacific Intermountain Express Co.; Pacific Motor Trucking Company; Ringsby Truck Lines; Shippers Express Company; Sterling Transit Company, Inc.; Valley Motor Lines, Inc.; T.I.M.E. Freight, Inc.; Walkup's Merchants Express; Willig Freight Lines; Garden City Transportation Co., Ltd.; California Cartage Company, Inc.; Boulevard Transportation Company; Callison Truck Lines, Inc., and Ringsby-Pacific Truck Lines (formerly Fortier Transportation Company).

individuals named in Footnote 2 below. Respondents declare in their First Amended Complaint that their complaint is also a class action on behalf of other carriers, deemed to exceed 100, similarly situated.

OPINIONS BELOW

The opinion of the District Court for the Northern District of California is reported at 1967 Trade Cases Paragraph 72,298 (N.D.Cal. 1967) and is printed as Appendix B hereto. The opinion of the Court of Appeals for the Ninth Circuit is reported at 432 F.2d 755 (1970) and is printed as Appendix A hereto.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit was entered on October 5, 1970. An extension of time for filing this petition to and including February 18, 1971 was granted by Mr. Justice Blackmun on December 22, 1970. A further extension of time for filing this petition to and including March 4, 1971 was

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[2]Trucking Unlimited, a corporation; Don D'Onofrio, an individual, dba Donofrio Drayage-Record Express; B.C. Lawson Drayage, Inc., a corporation; Cargo Carriers, Inc., a corporation; Meek Trucking Company, a corporation; L.D.S. Truck Lines, a corporation; G. A. Hutchinson & Son Draying, a corporation; Frank L. Nolan, Jr., an individual formerly a co-partner of Frank Nolan Drayage Co.; American Transfer Co., a corporation; Coast Drayage, a corporation; Ruddway Drayage Company, a corporation; Rose J. Antonini, Virgil J. Antonini, Administrator of the Estate of Louis E. Antonini, and Virgil J. Antonini, a partnership, dba Antonini Fruit Express; Johansen's Superior Truck Line, Inc., a corporation; Pozas Bros. Trucking Co., a corporation; and Spear Enterprises, Inc., a corporation dba United Truck Line.

granted by Mr. Justice Douglas on February 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. The basic question is whether Respondent's First Amended Complaint states a claim upon which relief can be granted.[3] Rule 12(b)(6) Fed.R.Civ.P. The answer turns on the following questions:

2. Does an alleged agreement with anticompetitive motive by a group of motor carriers, followed by the implementing and publicizing thereof, to carry out a jointly financed program of opposing, before the California Public Utilities Commission, the Interstate Commerce Commission, and the appropriate federal or state courts, all applications, irrespective of their merits, for certificates of public convenience and necessity, or for the transfer or registration of certificates, constitute a violation of the antitrust laws where there is no allegation that false or deceptive evidence was ever presented and no allegation that the administrative agencies and courts in question were ever lacking in, or failed to exercise, full power to control the extent to which they would allow protests or appearances or evidence?

3. Does not the *Noerr-Pennington* doctrine (*Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127

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[3]The case arises on a motion to dismiss the First Amended Complaint. District Judge Sweigert held that such complaint does not state a claim upon which relief can be granted. The dissenting Senior Circuit Judge Hamlin agreed with him. The other two judges who considered the case, Circuit Judge Browning and designated District Judge Pregerson, held to the contrary.

(1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965)), holding that Congress did not intend the Sherman Antitrust Act to apply to joint activities to influence governmental action, clearly extend to the alleged activities enumerated above?

4. Does not the *Noerr-Pennington* doctrine extend to such alleged activities even if the complaint be construed by inference to allege that a primary purpose of defendants was to discourage and deter respondents and others in like position from initiating or pursuing applications for certificates, or the transfer of registration thereof?

5. Would not a construction of the Sherman Antitrust Act to make unlawful the activities alleged in the First Amended Complaint infringe upon the constitutional right to petition provided for in the First Amendment?

STATUTES INVOLVED

The statutes involved are relevant portions of (1) the Sherman and Clayton Antitrust Acts, (2) the California Public Utilities Code, (3) the Interstate Commerce Act, and (4) the Administrative Procedure Act. Those provisions, together with pertinent portions of the rules of the Interstate Commerce Commission and the California Public Utilities Commission, are set forth in Appendix D hereto.

STATEMENT UNDER RULE 33(2)(b)

Since the proceeding draws into question the constitutionality of the Sherman and Clayton Acts, 15 U.S.C. §§1-27, when applied as the Court of Appeals has done

to the facts alleged in the First Amended Complaint, and since such Acts do affect the public interest and since neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. §2403 may be applicable.

No court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403, certified to the Attorney General the fact that the constitutionality of such Acts of Congress has been drawn in question.

STATEMENT OF THE CASE

A civil antitrust action was filed on May 6, 1966 in the federal district court pursuant to 15 U.S.C. §§ 15 and 26, by 14 of the 15 trucking respondents against the 19 trucking petitioners, seeking treble damages and injunctive relief under the Sherman and Clayton Acts, 15 U.S.C. §§1-27.[4]

All the 15 complaining respondents allege in their complaint that they are highway carriers of property within California, operating under certificates or permits issued by the California Public Utilities Commission (PUC) for intrastate traffic, and under authorizations of the Interstate Commerce Commission (ICC) for interstate traffic. Similarly all the 19 defending petitioners are highway carriers operating in California under similar authority and jurisdiction of the California PUC and the ICC.

Petitioners moved among other things to dismiss the First Amended Complaint for failure to state a claim

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[4]The fifteenth respondent joined later.

upon which relief could be granted. Federal District Judge Sweigert granted such motion after receiving oral argument. His reasoning is set forth in his Memorandum of Decision, appended hereto as Appendix B. He opined that since the pleading had already been amended once, respondents had gone as far as they could "truthfully go toward alleging an antitrust violation", but he allowed them 15 days to file leave to amend. Appendix B, pp. 38, 39. They declined, and instead appealed his ruling.

One year after hearing oral argument on appeal the Court of Appeals overruled Judge Sweigert by a 2 to 1 vote. The opinion of the majority, and Senior Judge Hamlin's dissent, which supports Judge Sweigert's opinion, are set forth in Appendix A attached hereto.

The complaint mingles alleged facts with characterizations thereof or conclusions. The alleged facts are as follows, with the characterizations and conclusions set forth in the footnote following:

> FACTS ALLEGED: Petitioners since 1961 have conspired to weaken or put respondents and others in like position out of business. To this end they have:
>
> 1. *Agreed* jointly to finance and to carry out and publicize a consistent, systematic and uninterrupted program of opposing "with or without probable cause and regardless of the merits" every application, with insignificant exceptions, for additional operating rights or the registration or transfer of operating rights, before the California PUC, the ICC, and the courts on appeal.
>
> 2. *Carried out* such agreement (a) by appearing as protestants in all proceedings instituted by respondents and others in like position or by instituting complaints in opposition to applications or

transfers or registrations; (b) by establishing a trust fund to finance the foregoing, consisting of contributions monthly in amounts proportionate to each petitioner's gross income; (c) by publicizing and making known to respondents and others in like position the foregoing program.

3. *Achieved* their purpose (a) by depleting the resources of respondents and others in like position; (b) by delaying the ultimate granting of rights, transfers or authorizations; (c) by discouraging and deterring respondents and others in like position from initiating or pursuing requests, applications or actions for rights, transfers, or registrations.[5]

There is *no allegation* of fact that the PUC, the ICC, or the courts have at any time been prevented from exercising full control over their respective procedures or their determinations on the merits; or that petitioners lacked standing to appear and protest in such proceedings; or that respondents have ever complained before

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[5]CHARACTERIZATIONS OF FACTS ALLEGED OR CONCLUSIONS: By means of the facts alleged petitioners have practically and actually made unavailable, and have effectively closed to respondents and others in like position, free and unlimited access to the machinery of the California PUC, the ICC, and the courts; have clogged and impeded such machinery; have abused such machinery; have denied to the California PUC, and ICC, and the courts the benefit of facts which respondents might have presented had they not been discouraged or deterred; have harassed and obstructed respondents and others in like position; have defeated, delayed, or restricted rights, transfers and registrations, regardless of the merits, because without the intervention of petitioners there would have been no opposition and the agencies or courts would have decided in favor of respondents or others in like position; have thwarted the policy of the PUC in liberally granting operative rights; have become the regulators of the rights, transfers and registrations in place of the PUC, the ICC, and the courts; have acquired and aggrandized their economic power and their monopoly power.

those bodies of the presence of petitioners and sought to limit or prohibit their appearance and participation; nor is there any allegation that the evidence presented by petitioners has been irrelevant or false. Finally, there is no allegation that petitioners agreed between themselves that if any one of them should seek additional certificated authority the others would refrain from protesting.[6]

In granting the motion to dismiss Federal District Judge Sweigert observed that the First Amended Complaint is limited by its express language which states: "Plaintiffs . . . do not complain of any activities of defendants or their conspirators toward, or in reference to, any function of the ICC or PUC *except* as such activities pertain to the precise proceedings before such bodies". (Emphasis added by Judge Sweigert. Appendix B, pp. 20, 21.) He concluded that the holdings in *Noerr* and *Pennington* (*Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)) made clear that the Sherman Act does not cover the acts alleged in the complaint even assuming an overriding purpose to injure and destroy in ways unrelated to the actions of the regulatory bodies.

Respondents appealed. The Court of Appeals for the Ninth Circuit reversed, with Judge Hamlin writing a dissenting opinion.

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[6]In fact, several of petitioners have sought additional authority and have met with vigorous opposition by the others. E.g., *Walk-up's Merchants Express*, PUC Application No. 47472 (1965); *Pacific Motor Trucking Company*, ICC Docket No. MC78786 (Sub No. 268) (1967).

REASONS FOR GRANTING THE WRIT

Petitioners submit that the Ninth Circuit decision (A) conflicts with *Noerr* and *Pennington* decided by this Court in 1961 and 1965, respectively; (B) conflicts with *Association of Western Railroads v. Riss & Co.*, 299 F.2d 133, which was decided in 1962 by the Court of Appeals for the District of Columbia; (C) raises important and unsettled questions relating to the reach of the antitrust laws and violates the right to petition guaranteed by the federal Constitution; and (D) reaches a result which affects a substantial segment of the American society, including over three hundred trade associations which have expressed genuine concern over the decision.

A. CONFLICT WITH NOERR AND PENNINGTON

Petitioners respectfully urge that the Ninth Circuit decision is indeed in conflict, certainly in reasoning and principle, with this Court's decisions in *Noerr* and *Pennington*.

In *Noerr* three reasons were assigned by Mr. Justice Black, speaking for a unanimous Court, in concluding that Congress did not intend the Sherman Act to extend to joint efforts to influence public officials even though accompanied by an intent to eliminate competition: (1) Congress intended the antitrust laws to reach business activity, not political activity which is essentially dissimilar; (2) inclusion of political activity within the antitrust laws would prevent governmental bodies from obtaining needed information; (3) inclusion of political activity within the antitrust laws would raise serious questions of violation of the First Amendment right to petition.

1. Congress intended the antitrust laws to reach business activity, not political activity which is essentially dissimilar

This Court in *Noerr* held that the Sherman Act should not be interpreted to apply to joint agreements, with an anticompetitive motive, to influence public officials because such activity bears little resemblance to the kind of joint agreements with which Congress was concerned. Rather the congressional concern was with such devices as price-fixing agreements, boycotts and market-division agreements, all of them relating to business activity.

To get around this interpretation of the Sherman Act the Ninth Circuit majority rationalized that proceedings before administrative agencies and courts on the issue of public convenience and necessity are "adjudicatory" rather than "legislative" or political in nature, and that the patent cases[7] establish that anti-competitive agreements to seek or refrain from seeking action by adjudicatory bodies fall outside the *Noerr* doctrine.

The Ninth Circuit majority's exercise in labelling cannot withstand analysis under *Noerr* and *Pennington*. In the first place, the alleged agreements jointly to present

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[7] *Walker Process Equipment Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963); *Kobe Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 424-425 (10th Cir. 1952); *Lynch v. Magnavox Co.*, 94 F.2d 883 (9th Cir. 1938). The Ninth Circuit also relied on one pre-*Noerr* case involving joint appeals before administrative agencies. *Slick Airways, Inc. v. American Airlines*, 107 F.Supp. 199, 213-14, (D.N.J. 1951), *appeal dismissed*, 204 F.2d 230 (3rd Cir. 1953).

It seems unnecessary in this petition to set forth the analysis demonstrating that the patent cases are not relevant to the instant proceeding although bearing a superficial resemblance. It is noteworthy that this Court itself did not mention *Noerr* as having a bearing upon the *Singer* case, *supra*, although *Noerr* had only recently been decided.

commonly held positions before administrative bodies and courts have, like the joint activities in *Noerr* and *Pennington*, an "essential dissimilarity" with the business-type agreements traditionally held violative of the anti-trust laws.

Moreover, passages in both *Noerr* and *Pennington* indicate that the doctrine was intended to, or by necessary implication does, apply to joint appeals directed to all branches of government. Thus *Noerr* states:

> "To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the *government* of their wishes would impute to the Sherman Act a purpose to regulate, *not business activity*, but *political activity*, a purpose which would have no basis whatever in the legislative history of that Act." 365 U.S. 137 (Emphasis added.)

Again, in *Pennington* Mr. Justice White states for the court:

> "Joint efforts to influence *public officials* do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. 671 (Emphasis added.)

The use of the term "public officials", indicates that the doctrine comprehends appeals to officials in all branches of government. Cf. *NAACP v. Button*, 371 U.S. 415 (1963).

Even if the Ninth Circuit majority is right in limiting the scope of *Noerr-Pennington* to appeals to govern-

mental bodies acting in a legislative or quasi-legislative capacity it is basic error not to classify the alleged activities of petitioners as such. The determination of public convenience and necessity is in essence a legislative, policy-making function delegated by Congress or the state legislature. It is not litigation or adjudication in the normal sense.

The phrase "public convenience and necessity" is a term of art by which legislatures have traditionally delegated a large measure of legislative discretion to the regulatory body to determine what factors should govern the issuance of certificates according to the prevailing economic, political and social scene. See, for instance, the comments of Justice Frankfurter in *F.C.C. v. Pottsville Broadcasting Co.* (1940), 309 U.S. 134 at 137, 138.

The California PUC acts in a legislative capacity when it determines whether or not to issue a certificate of public convenience and necessity. *Southern California Edison Co. v. Railroad Commission,* 6 Cal.2d 737 at 748, 59 P. 2d 808 (1936); *San Diego and Coronado Ferry Co. v. Railroad Commission,* 210 Cal. 504, 292 Pac. 640 (1930); see Public Utility Regulatory Law, Vantage Press, 1956, by Judge Everett McKeage, former chief counsel and subsequently a member of the California Public Utilities Commission. Section 1005 of the California Public Utilities Code recognizes the legislative aspect of the issuance of certificates based upon public convenience and necessity by providing that the Commission may issue certificates with or without hearing. See Appendix D, p. 64.

The ICC is in like position as the California PUC. This Court long ago stated that the ICC cannot be regarded

as clothed with judicial functions or possessing the machinery of a court of justice. *Chicago Milwaukee & St. Paul Railway Co. v. Minnesota,* 134 U.S. 418 (1890). The ICC is not part of the federal judiciary but an "executive agency" of the federal government. See Democracy in Action by Milford Springer, Vantage Press, 1966, page 70 et seq.

The very fact that public convenience and necessity has in the past been attacked as an unconstitutional delegation of legislative authority because of its vagueness and lack of guiding standards attests to its essentially legislative and political character. *N.B.C. v. United States,* 47 F.Supp. 940 (S.D. N.Y. 1942); *Oro Electric Corp. v. Railroad Commission,* 169 Cal. 466, 147 Pac. 118 (1915).

Support for the conclusion that the regulation of entry into the field through certification is not a "judicial" but legislative function, if labels are to be used, is found in Judge Friendly's scholarly article, *The Federal Administrative Agencies; The Need for a Better Definition of Standards,* 75 Harv.L.Rev. 863, 871 (1962). See also the comments of Professor Davis in *Administrative Law Treatise* (1958) §7.20.

2. Inclusion of political activity within the antitrust laws would prevent governmental bodies from receiving needed information, especially in those areas where the policy of the government is to restrain competition rather than allow it

The second reason assigned by the Court in *Noerr* for concluding that the Sherman Act does not reach anti-competitive joint action in attempting to influence governmental action was that otherwise the power of govern-

ment to take actions through its legislature and executive in those areas that operate to *restrain* trade would be "substantially impair[ed]" because of the lack of adequate information. 365 U.S. at 137. The government cannot act as it should unless people can freely inform it without fear of antitrust violation. That reason applies with force in the area of certification of truck rights, an area in which the policy of government, both federal and state, is to *restrain* and *restrict* competition rather than allow free competition.

The Ninth Circuit majority, having labelled the certificating process as "adjudicatory", terminated the discussion, leaving unanswered the only really pertinent enquiry: is it the kind of proceeding in which potential competitors should be *encouraged* to protest and present evidence; does the administrative agency need to be informed by the very information and evidence which potential competitors are willing and can be counted on to produce if protected against the antitrust laws; is such information essential if the agency is to fulfil its obligation of making determinations of public convenience and necessity in accordance with economic, social and political considerations prevailing at the time? An applicant for a certificate, or the transfer thereof, can be counted on to submit the best possible case it can in support of the application. On the other hand, who is in a better position, and is more motivated, than the existing holders of certificates to present all of the information and policy considerations which militate against the issuance of the proposed authority?

Indeed, both the rules of the regulatory bodies in question and their long practice contemplate that potential

competitors shall be notified of each application so that they may provide the information and arguments in opposition to the application. Both the ICC and the California PUC recognize the propriety of participation, and indeed encourage the participation by existing certificated carriers, in applications for certificates, or in related proceedings. Applicants are required to notify potential competitors; such competitors may intervene and appear as parties; they may offer evidence and engage in cross-examination, and may file briefs and present oral argument, and they have standing to seek court review. The PUC or ICC hearing officer is given power to restrict presentation and cross-examination by intervening parties and to prohibit intervention unless the petitioner can demonstrate a legitimate interest. As to the ICC, see 49 C.F.R. §§1100.39, 1100.40, 1100.74, 1100.76, 1100.96, 1100.101, and 1100.247(d)(5). As to the PUC see Rules 21, 53-57, 75, 76 and California Public Utilities Code, sections 1731-1736, these rules and provisions are set out in Appendix D hereto.

When potential competitors do not appear the commissions often find themselves helpless to act with full information at their disposal since their own staffs are not geared or large enough to take an active hand except in special cases.

The First Amended Complaint itself recognizes that the information and evidence furnished by protesting carriers to the regulatory agency may be significant and convincing. Thus one finds the allegation (Appendix C, page 50): "Such decisions [by the PUC or ICC] . . . but for the defendants' combination and conspiracy,

would not have been rendered adverse to plaintiff and other competitors of defendants, because no opposition would otherwise have been commenced."

It is alleged in the First Amended Complaint (Appendix C, pp. 49-50) that petitioners would not have participated in the proceedings in question if not for the combination under which they could share the cost. Assuming the truth of this allegation, it simply points up the importance of immunizing such joint efforts from the sweep of the antitrust laws; unless it can be made economically feasible to protestants, through the pooling of their resources and the use of common counsel, to present evidence and policy considerations in opposition to certificate applications, the regulatory body is foreclosed from receiving information which is essential to adequate fulfilment of its delegated obligation.

Clearly the function of the PUC and the ICC in acting upon applications for certificates, or the transfer thereof,[8] is a policy-making function delegated by the legislature, and the PUC and ICC are as much in need of being informed by potential competitors in this area of restraint upon competition as the legislature itself would be.

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[8]The "public convenience and necessity" standard is set forth in California Public Utilities Code §1063, and in the Interstate Commerce Act, 49 U.S.C. §§306, 307, 309.

The legislative standards given the PUC and ICC to authorize transfers of certificates are even vaguer than for certification. The statutes in certain situations provide no standard at all. See California Public Utilities Code §851; Interstate Commerce Act, §212(b), 49 U.S.C. §312(b). In other situations "consistency with the public interest" is the only test. 49 U.S.C. §5(2)(b).

3. Inclusion of political activity within the antitrust laws would raise serious questions of violation of the right to petition guaranteed by the First Amendment of the U.S. Constitution

The third reason which impelled the Court in *Noerr* to conclude that the Sherman Act was not intended to cover solicitation of governmental action was that if a contrary interpretation were adopted it:

> ". . . would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above." 365 U.S. 138.

These constitutional considerations apply with equal force in the instant case, yet the Ninth Circuit brushed this constitutional guarantee aside without discussion, once it concluded that the proceedings in question were "adjudicatory".

As to the alleged appearance before the various courts, it is clear from the First Amended Complaint that the courts were involved only in their capacity as overseers of determinations made, in the first instance, by the two commissions. This being so, there is no valid basis to say that the alleged joint activity before the courts should be treated differently from the joint activity before the commissions. The reasoning in *Noerr* does not permit of such a distinction. *Baltimore & Ohio Ry Co. v. New York, N.H. & H.Ry,* 196 F.Supp. 724 (S.D.N.Y. 1961). Even if the appeal to the judiciary were not in connection with administrative action the antitrust immunity of *Noerr*

would hold. *Bracken's Shopping Center v. Ruwe,* 273 F.Supp. 606 (S.D.Ill. 1967). And this Court itself recognized in the landmark case of *NAACP v. Button,* 371 U.S. 415 (1963) that the joining together in proceedings before the judiciary is a right guaranteed by the First Amendment.

4. The Ninth Circuit majority's holding as to sham is also in conflict with Noerr

The Ninth Circuit majority held that even if the *Noerr-Pennington* doctrine applies to give antitrust immunity to joint solicitation of administrative bodies and courts as alleged, there are allegations in the First Amended Complaint which make the "sham" exception alluded to in a dictum in *Noerr* applicable. Here again the Ninth Circuit majority has misconstrued the *Noerr* decision.

This Court in *Noerr* held that antitrust immunity applies to group solicitation of governmental action *even* with the added factor, as found by the lower court, that the purpose of the defendant railroads was:

> ". . . more than merely an attempt to obtain legislation. *It was the purpose and intent . . . to hurt the truckers in every way possible* [by destroying their good will and their competitive position] *even though they* [the railroads] *secured no legislation.*" 365 U.S. 142. (Emphasis in original.)

This Court said that the right of the people to inform the representatives in government of their desires cannot properly be made to depend upon their intent in doing so, and therefore antitrust immunity applies regardless of intent, 365 U.S. 139. By way of dictum this Court added:

> "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt *to interfere directly with the business relationships of a competitor* and the application of the Sherman Act would be justified." 365 U.S. 144 (Emphasis added.)

This Court said such "sham" exception was inapplicable because: "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers." 365 U.S. 142.

In the instant case the Ninth Circuit majority said that the "sham" exception applies because the First Amended Complaint can be construed to allege a primary purpose "to impose a direct restraint under the guise of a program to induce governmental action," viz: a purpose to restrain competition directly by discouraging the filing of requests for such action. (Appendix A, pp. 11, 13, 14.) The Ninth Circuit majority reached this conclusion in spite of the fact that respondents have stated that "The misuse of the judicial process constitutes plaintiffs' [respondents'] entire factual and legal case." (Plt. Brief filed 5/16, 67; p. 42) and in spite of the fact that the First Amended complaint states:

> "Plaintiffs . . . do not complain of any activities of defendants or their conspirators toward, or in reference to, any function of the I.C.C. or P.U.C. *except* as such activities pertain to the precise proceedings before such bodies." Appendix B, pp. 20, 21. (Emphasis added.)

The holding of the Ninth Circuit majority flies directly in the face of the reasoning in *Noerr. First,* it presupposes

that intent or purpose has a bearing in determining whether joint solicitation of governmental officials is lawful, yet this Court said the contrary in the following words:

> "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." 365 U.S. 139. (Emphasis added.)

Secondly, the conclusion presupposes that if an effect of joint solicitation of governmental officials is to discourage the filing of requests with governmental officials, and that such discouragement is a primary intent or purpose, it is a direct restraint falling within the sham language. Yet the Court was quite specific in saying it meant something quite different. It twice said it was talking about attempts "to interfere directly with the *business relationships*" of a competitor (365 U.S. 144). To drive this point home concretely it said "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers" (365 U.S. 142). By no stretch of the imagination does the First Amended Complaint allege an attempt by petitioners to persuade anyone not to deal with the respondent truckers, or any attempt in any way to interfere directly with the business relationships of the respondents.

The Court in *Noerr* recognized that adverse effects may occur but held that they do not alter the antitrust immunity even when such effects are the primary motive:

> "It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction

> of some direct injury upon the interests of the party against whom the campaign is directed. And it seems inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing of infliction of such injury renders the campaign illegal would thus be tantamount to outlawing all such campaigns." 365 U.S. 143, 144.

The *third* reason why the Ninth Circuit decision is wrong as to sham is that the First Amended Complaint reveals that petitioners enjoyed substantial success in their efforts before the regulatory bodies and courts. Appendix C, p. 50. As this Court pointed out in *Noerr,* that fact in itself disproves sham:

> "But this [sham] is certainly not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the truckers' complaint is fully credited, as it was by the courts below, that effort was not only genuine but highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case." 365 U.S. 144.

Petitioners submit that the allegations of respondents state a case on all fours with *Noerr* on the question of sham, and it follows that the Ninth Circuit majority erred in finding that the First Amended Complaint stated antitrust activity falling within the sham exception to antitrust immunity. One is constrained to conclude that the Ninth Circuit majority was quite out of sympathy with the *Noerr-Pennington* doctrine which they characterized as "a

judicially implied exception" and sought to avoid it. Their conclusion is irreconcilable with *Noerr*, and their opinion if allowed to stand, will have serious adverse consequences. They have enlarged the potential crack in the dike of antitrust immunity suggested by the "sham" exception dictum to the *Noerr-Pennington* doctrine, to the point that many if not most of those who would be entitled to its protection now are faced with Hobson's choice: exposure to the floodwaters of private antitrust litigation or sacrifice of their rights under the law and constitution to participate in administrative and judicial proceedings affecting them. It is submitted that this Court *must not* allow such an unfortunate situation to be perpetuated.

B. CONFLICT WITH DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The decision of the Ninth Circuit majority in the instant case conflicts with the decision rendered shortly after, and in reliance upon, *Noerr*, by the Court of Appeals for the District of Columbia Circuit in *Association of Western Railways v. Riss and Co.*, 299 F.2d 133 (1962).

In that case an interstate trucker brought a treble damage antitrust action against 85 railroads, 4 railroad associations, and a public relations firm charging a conspiracy to monopolize and to eliminate Riss's competition in the transportation of ammunition and explosives for the United States.

In a brief decision the Court of Appeals reversed the lower court's action on the ground that the instruction

to the jury was contrary to the holding in *Noerr*. The instruction was that joint solicitation of government action with respect to the passage of enforcement of law violates the Sherman Act if its purpose is to destroy competition and if deceitful propaganda is used.

Reference to the decision of the district court in *Riss* (*Riss & Co. v. Association of American Railroads*, 170 F. Supp. 354 (1959)) reveals that the activities complained of included the following: carrying on a program of soliciting, either directly or through front organizations, officials of various states to take steps leading to the revocation of plaintiff's interstate operating authority; this included (a) employment of a public relations expert to persuade the Public Utilities Commission of Ohio to file proceedings before the Interstate Commerce Commission looking toward cancellation of plaintiff's operating authority; (b) abuse of the privilege of intervention in I.C.C. proceedings by joining together in an extensive and vicious campaign of anti-truck propaganda by which to persuade citizens' groups to register complaints against Riss in application proceedings before the I.C.C. initiated by Riss for new operating authority; (3) appeals to the Ohio Public Utilities Commission, either directly or through front organizations, to apply unusually strict enforcement against Riss of the applicable statutes and regulations.

These activities, as well as others enumerated in the complaint, were held on the authority of *Noerr* to fall outside the Sherman Act. It will be noted that the alleged activity before the ICC was evidently the presentation of evidence adverse to Riss in formal proceedings for certificates of public convenience and necessity, such evidence being of-

fered by groups which had been propagandized by defendants rather than by defendants themselves. This indirect approach to the regulatory body seems far less entitled to antitrust immunity than the honest, direct and forthright opposition of petitioners in the present case in application proceedings before the California PUC and the ICC.

The conflict between the *Riss* case and the instant one over the interpretation of *Noerr* should be resolved.

C. THE PRESENT CASE RAISES IMPORTANT AND UNSETTLED QUESTIONS RELATING TO THE REACH OF THE ANTITRUST LAWS IN THE LIGHT OF THE FIRST AMENDMENT OF THE CONSTITUTION.

This case raises the question of how the policy of the U.S. Government against monopolies and restraints of trade as set forth in the antitrust laws can be fitted in with the constitutional right to petition government and accommodated with the need of government to be informed. This in turn raises the question of how the accommodation once determined should be implemented. Should not the doctrine of primary jurisdiction or a doctrine akin thereto be invoked to deal with alleged abuses of the right to petition rather than an interpretation of the antitrust laws to extend to activity essentially political in nature? The following quotation from *Noerr* would suggest an affirmative answer: "The prescriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate in the political arena." 365 U.S. 141. Dissenting Circuit Court Judge

Hamlin of the Ninth Circuit reached that conclusion in the instant case:

> "The Public Utilities Commission has the power and ability to correct any abuses flowing from the activities of defendants through their opposition to the grant or transfer of certificates . . . and I think that the plaintiffs must look to the Commission, rather than to the Sherman Act, for their remedy." Appendix A, p. 15.

The instant case has already evoked one extensive law review note. 57 CALIF.L.REV. 518 (1969). Petitioners have been informed that another is on the way. Needless to say, the *Noerr-Pennington* doctrine and subsequent cases related to it have produced a substantial body of scholarly commentary, reflecting much diversity of opinion.[9]

The instant case, as to which the four judges who have considered it have split evenly, has created such uncertainty that the case in itself may well produce a chilling effect upon First Amendment rights. Thrown in doubt is not only the right to petition in concert, but also the right individually to advocate one's views freely, since the reasoning employed by the Ninth Circuit majority would apply equally to individual protests under Sherman Act, §2.

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[9]*See, e.g.*, Costilo, Antitrust's Newest Quagmire: The *Noerr-Pennington Defense*, 66 MICH.L.REV. 333 (1967); Walden, *More About Noerr—Lobbying, Antitrust and the Right to Petition*, 14 U.C.L.A.L.REV. 1211 (1967); Note, 47 CORNELL L.Q. 250 (1962); Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV.L.REV. 847 (1968); Note, 106 U.PA.L.REV. 69 (1957); Note 23 U.PITT.L.REV. 216 (1961); Note 33 ROCKY MT.L.REV. 413 (1961); Note, 70 YALE L.J. 135 (1960).

D. RESOLUTION OF THE ISSUES IN THIS CASE IS IMPORTANT TO A SUBSTANTIAL SEGMENT OF AMERICAN SOCIETY.

That the issues have a significance transcending the interests of the particular parties in this case is manifest from the canvass which petitioners have made of trade associations in the United States. Petitioners have received *over three hundred* expressions of interest, requesting a copy of the Ninth Circuit decision, and in some cases expressing grave concern over its effect upon their particular activities, and in a substantial number of instances indicating serious contemplation of the advisability of seeking the right to file an amicus curiae brief.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted

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Of Counsel for Petitioners.

March 4, 1971.

(Appendices Follow)

Appendix A

United States Court of Appeals
For The Ninth Circuit

No. 22,462

Trucking Unlimited, et al.,
Plaintiffs-Appellants,
vs.
California Motor Transport Co., et al.,
Defendants-Appellees.

[October 5, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: Hamlin and Browning, Circuit Judges,
and Pregerson,* District Judge.

Browning, Circuit Judge:

This is an action by one group of trucking companies against another seeking treble damages and injunctive relief under the Sherman and Clayton Acts, 15 U.S.C. §§ 1-27. All are common carriers regulated by the California Public Utilities Commission (PUC) and the Interstate

*Honorable Harry Pregerson, United States District Judge, Central District of California, sitting by designation.

Commerce Commission (ICC) and require licenses from these agencies to operate.

The complaint alleges a conspiracy among defendants to restrain and monopolize the highway common carriage business in California and elsewhere by a jointly financed, widely publicized program of opposing, before the two commissions and the courts, all applications by actual or potential competitors for the issuance, transfer, or registration of operating rights. The district court dismissed the action on the ground that the complaint failed to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6).[1] For the purposes of this appeal, we must accept all the allegations of the complaint as true, 2A Moore, Federal Practice ¶ 12.08, at 2266-67; and we can affirm only if "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). *See Harman v. Valley National Bank,* 339 F.2d 564, 565 (9th Cir. 1964); *Corsican Productions v. Pitchess,* 338 F.2d 441, 442 (9th Cir. 1964).

The district court held that relief was barred by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), and *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), which hold that the Sherman Act does not forbid attempts to influence the passage or enforcement of laws. We disagree for two reasons. First, concerted employment of judicial and administrative adjudicative processes as part of a scheme to restrain trade, as alleged in this complaint, is not excluded

[1]The district court's opinion is reported at 1967 Trade Cas. ¶ 72,298 (N.D. Cal. 1967).

from the Sherman Act by the *Noerr-Pennington* doctrine. Second, even if the *Noerr-Pennington* rule does apply to the use of judicial and administrative adjudicative processes in a scheme to restrain trade, relief is not barred if, as alleged in this complaint, the real purpose of defendants' joint activity was to restrain competitors directly, rather than to restrain them indirectly by inducing restrictive governmental action.

I

The *Norr-Pennington* principle is a judicially implied exception to the general rule that an unlawful purpose may bring otherwise lawful means within the proscription of the Sherman Act. *See American Tobacco Co. v. United States,* 328 U.S. 781, 809 (1946). The exception's premise is that the responsibility for enacting or not enacting laws concerning trade restraints rests with the legislative branch of government; and, similarly, responsibility for enforcing or not enforcing those laws rests with the executive branch. *Noerr, supra,* 365 U.S. at 135-136. Hence, valid legislative or executive action that results in the restraint or monopolization of trade does not violate the Sherman Act. *United States v. Rock Royal Co-operative, Inc.,* 307 U.S. 533, 560 (1939).[2]

Attempts to influence the legislative and executive branches are also excluded from the Sherman Act because prohibiting such activity "would substantially impair the

[2]The Supreme Court has also held that the Sherman Act does not apply to valid *state* legislative or executive action since "the Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." Parker v. Brown, 317 U.S. 341, 351 (1943).

power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Noerr, supra,* 365 U.S. at 137.[3]

And the Sherman Act does not apply to efforts to influence the enactment or enforcement of laws even when those efforts are motivated by an anticompetitive purpose because "it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." *Id.* at 139.

This is a powerful argument for holding that joint efforts to influence legislative and executive action are excluded from Sherman Act liability regardless of purpose, but it does not justify immunizing agreements to utilize

[3]Such efforts are the "political activity" referred to in *Noerr.* The Court proffered two additional reasons for its holding: (1) the "essential dissimilarity" between agreements traditionally condemned by the Sherman Act—price fixing, boycotts and market divisions—and agreements to solicit the passage or enforcement of laws; and (2) the important constitutional questions concerning the right to petition the government that would be raised if the Act were construed to prohibit joint solicitation of government action.

judicial and administrative adjudicative processes in a scheme to restrain trade. The fundamental reason for the *Noerr-Pennington* exception does not apply. It is not the function of the courts to determine whether laws restraining trade will be adopted or, having been adopted, whether they will be enforced; nor is this the function of an administrative agency engaged in adjudication, as the PUC and ICC are here.[4] It would be pointless to limit the reach of the Sherman Act in order to protect the access of courts and agencies engaged in adjudicative functions to information and opinion relevant to determinations which they have no power to make.[5]

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[4]Licensing proceedings are adjudicative rather than legislative in nature. 5 U.S.C. § 551 (6)-(9). The PUC, for example, applies a standard of "public convenience and necessity," Cal. Pub. Util. Code § 1064, to the facts in each case—experience, financial ability, available equipment. *See, e.g.*, Encinal Terminals, 61 Cal. P.U.C. 807, 809-10 (1950). Davis characterizes as adjudicative "facts about the parties and their activities, businesses, and properties," 1 K. Davis, Administrative Law Treatise § 7.02, at 413 (1958), and Judge Friendly has described as judicial "the application of standards of greater or less generality to concrete cases." Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 Harv. L. Rev. 863, 874 (1962). Plaintiffs expressly excluded any PUC or ICC rule-making proceedings from the complaint.

Furthermore, beyond their efforts to influence administrative adjudicative processes, defendants allegedly pursued appeals in the courts from every adverse administrative determination. Even if the agency determinations were quasi-legislative, and thus within the *Noerr-Pennington* exception, court proceedings to review those determinations would be subject to the general strictures of the antitrust laws. *But see* Woods Exploration & Prod. Co. v. ALCOA, 284 F.Supp. 582, 594-595 (S.D. Tex. 1968).

[5]The holding in *Pennington* that it was error to instruct the jury in that case that joint "approaches" to Tennessee Valley Authority officials and to the Secretary of Labor might be illegal if accompanied by an anticompetitive purpose is not inconsistent with our conclusion that efforts to influence administrative adjudicative proceedings are not within the *Noerr-Pennington* exemption. There is nothing to indicate that the administrative action sought to be influenced was adjudicatory; the language of the *Pennington*

Accordingly, the general rule is applicable—the Sherman Act is violated by a conspiracy to unreasonably restrain or monopolize trade through the use of judicial and administrative adjudicative proceedings. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 424-425 (10th Cir. 1952); *Lynch v. Magnavox Co.*, 94 F.2d 883 (9th Cir. 1938); *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F.Supp. 199, 213-14 (D. N.J. 1951), *appeal dismissed*, 204 F.2d 230 (3d Cir. 1953).[6] *See also* Note, The Brakes Fail on the Noerr

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opinion suggests that it was not. Clearly, the decision of TVA officials to purchase their coal requirements on the open market was not adjudicatory in character. The nature of the "approach" to the Secretary of Labor is unclear. The Secretary has a good deal of discretion in determining whether to initiate proceedings under the Walsh-Healey Act to set a minimum wage in a given industry. 41 C.F.R. § 50-203.15; *see* Modley, Patton & Reilly, Problem Child Among Labor Laws—The Walsh-Healey Act, 1963 Duke L. J. 205, 210, 221; 48 Dep't of Labor Ann. Rep. 250 (1960). If the "approaches" were to influence his exercise of that policy-making function under the Act, they were protected under *Noerr*. *See* Harman v. Valley Nat'l Bank, 339 F.2d 564, 566 (9th Cir. 1964). Moreover, even if we assume that defendants sought to influence the wage determination itself, the proceeding by which that determination is made, though including a hearing, 41 U.S.C. § 43a(b), is nonetheless rule-making and quasi-legislative in nature, *see* 5 U.S.C. § 551(4) & (5); Wirtz v. Baldor Elec. Co., 119 U.S. App. D.C. 122, 337 F.2d 518, 534 (1963), rather than adjudicative.

[6]At the very least, these decisions demonstrate that agreements to use litigation as a means to restrain trade are not "essentially dissimilar," in the *Noerr* sense, from those traditionally condemned under the Sherman Act.

They also support the proposition that, on balance, the public interest in free competition served by the condemnation of agreements to use judicial and administrative adjudicative processes for the purpose of restraining trade outweighs the resulting restraint upon first amendment rights. *See* Note, The Brakes Fail on the Noerr Doctrine, 57 Calif. L. Rev. 518, 537-40 (1969). As the court

Doctrine, 57 Calif. L. Rev. 518 (1969). *But see Bracken's Shopping Center, Inc. v. Ruwe,* 273 F.Supp. 606 (S.D. Ill. 1967).[7]

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observed in Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 424 (10th Cir. 1952):

> "It is said that to allow recovery of damages resulting from the infringement action would be a denial of free and unrestricted access to the courts. We fully recognize that free and unrestricted access to the courts should not be denied or imperiled in any manner. At the same time we must not permit the courts to be a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition."

See also Report of the Attorney General's National Committtee to Study the Antitrust Laws 248 (1955).

The overwhelming public interest in uninhibited communication between the people and their legislators and law enforcement officials that justifies immunizing joint efforts to influence those authorities from antitrust liability despite either wrongful purpose or the use of distortion and deception, does not apply to presentations to judges and administrative officials in the course of adjudicative proceedings. Unlike legislators and law enforcement officials, judicial and administrative adjudicators do not act in a representative capacity. There is a marked difference between the processes by which they arrive at decisions, the materials upon which they may properly rely, and the atmosphere consistent with effective performance of their respective functions. Sheppard v. Maxwell, 384 U.S. 333, 350-351 (1966); Bridges v. California, 314 U.S. 252, 271 (1941); Costilo, Antitrust's Newest Quagmire: The Noerr-Pennington Defense, 66 Mich. L. Rev. 333, 349 (1967); Note, The Brakes Fail on the Noerr Doctrine, 57 Calif. L. Rev. 518, 532-33 (1969); *cf.* Note, Application of the Sherman Act to Attempts to Influence Government Action, 81 Harv. L. Rev. 847, 849 (1968).

It is significant that in *NAACP v. Button,* 371 U.S. 415 (1963), a decision heavily relied upon by defendants, the Supreme Court discussed with approval cases that rely upon the actor's purpose in distinguishing the lawful and ethical from the unlawful and unethical in the area of stimulating litigation, *see* 371 U.S. at 439-441, and repeatedly noted that the NAACP acted with a lawful purpose in urging utilization of the courts. *Id.* at 429-430, 439-441. *See also* Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

[7]Other decisions are distinguishable. E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966), involved governmental rather than private action. In Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co., 214

The district court considered *Singer* and the other patent cases inapposite because they involved patent litigation[8] and because litigation was only one of several means employed in the scheme to restrain trade. The court did not explain the significance of either factor, and we do not see any.

Because the legal monopoly conferred by a patent lends itself to misuse as a means to illegally monopolize and restrain trade, it is often a significant factor in determining whether a particular course of conduct violates the Sherman Act, that a patent is involved. This fact, however, has no bearing at all upon whether the *Noerr-Pennington* defense applies. That doctrine is concerned with protecting joint efforts to influence governmental action as such—the subject matter of the governmental action is beside the point. The significance of the cases cited is not that they involve the use of patent litigation to restrain trade, but that they involve the use of litigation for that purpose. They demonstrate that litigation can be an integral part of a scheme prohibited by the Sherman Act.

F.2d 413 (5th Cir. 1954), and Woods Exploration & Prod. Co. v. ALCOA, 284 F.Supp. 582 (S.D. Tex. 1968), the only injury alleged resulted from valid governmental action. Both of those cases as well as Association of Western Rys. v. Riss & Co., 112 U.S. App. D.C. 49, 299 F.2d 133 (1962), Schenley Indus. Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n, 272 F.Supp. 872 (D. N.J. 1967), and A.B.T. Sightseeing Tours Inc. v. Gray Line N.Y. Tours, 242 F.Supp. 365 (S.D.N.Y. 1965), appear to have involved administrative rule-making rather than adjudication. Citizen's Wholesale Supply Co. v. Snyder, 201 F. 907 (3d Cir. 1913), involved efforts to influence a local prosecutor's enforcement of an ordinance, *see* Harman v. Valley Nat'l Bank, 339 F.2d 564 (9th Cir. 1964), and there was no allegation of anticompetitive purpose.

[8]Slick Airways, *supra*, cited with approval by the Supreme Court in Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690, 707 (1962), did not involve patent litigation.

Pennington disposes of the second basis for distinction relied upon by the district court. If the *Noerr-Pennington* defense had applied to the use of litigation for the purpose of restraining trade, the defense would have been available whether this means was employed as part of a larger scheme or stood alone. *Pennington, supra,* 381 U.S. at 670. Furthermore, litigation and threats of litigation were the only means used to exclude competitors in *Walker Process.*

We conclude, therefore, that the *Noerr-Pennington* defense does not bar relief when a conspiracy to employ judicial and adjudicative processes in a scheme to restrain trade is alleged.

II

Dismissal was improper for another reason. Plaintiffs have alleged that defendants' real purpose was to restrain trade directly, rather than indirectly through the medium of governmental action. If this is true, plaintiffs may prevail under the "sham" exception to the *Noerr-Pennington* rule regardless of the status of joint approaches to adjudicative bodies under that defense.

The plaintiffs in *Noerr* contended, and the trial court found, that the defendants sought to injure plaintiffs directly by destroying their good will with the public and with their customers, thus weakening their competitive position and causing them to lose business. The Supreme Court noted that "the apparent effect of these findings is to take this case out of the category of those that involve restraints through governmental action and thus render inapplicable" the principle that efforts to induce such governmental action do not violate the Sherman Act. 365

U.S. at 142. The Supreme Court held, however, that plaintiffs' attempt to exclude their case from the latter category failed for want of evidence.

The Court pointed out that there was no finding that the defendants attempted directly to persuade anyone not to deal with the plaintiffs. On the contrary, the evidence reflected only efforts by the defendants to influence the passage and enforcement of laws. The Supreme Court concluded, therefore, that "the findings of the District Court that the [defendants'] campaign was intended to and did in fact injure the [plaintiffs] in their relationships with the public and with their customers can mean no more than that the [plaintiffs] sustained some direct injury as an incidental effect of the [defendants'] campaign to influence governmental action and that the [defendants] were hopeful that this might happen." *Id.* at 143.

This was not enough to render defendants' publicity campaign actionable. The Court noted that whenever an attempt is made to influence legislation by such a campaign it is inevitable that some incidential injury will be visited upon the opponents, and equally inevitable that those conducting the campaign will be aware of this possibility.

On the other hand:

> "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denies that the [defendants] were making a genuine effort

> to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the [plaintiffs'] complaint is fully credited, as it was by the courts below, that effort was not only genuine but also highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case." *Id.* at 144.

The "sham" exception is derived from the basic rationale of the *Noerr-Pennington* defense: The Act does not bar legislation or law enforcement restraining trade and therefore does not bar the solicitation of such action. Conversely, if joint action is not for the purpose of restraining competition by inducing governmental action, but is rather for the purpose of imposing a direct restraint by the defendants' own conduct, the Sherman Act applies. *Cf. Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-707 (1962).

Plaintiffs assert that their proof[9] would establish such a conspiracy to impose a direct restraint under the guise of a program to induce governmental action. Briefly, they make the following allegations.

It was and is the policy of the PUC to encourage competition in the trucking industry by freely granting, and approving the transfer of, certificates of public convenience and necessity. Until 1963 it was the policy of the ICC to register any certificate issued by the PUC automatically, without further hearing.

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[9]Some of the details recited appear in plaintiff's briefs and are not specifically set out in the complaint. The allegations of the complaint are clearly sufficient to allow their proof.

In 1961 defendant trucking companies, the largest highway common carriers in California and the western states, undertook to lessen competition from smaller companies resulting from the relatively easy access to operating rights. They decided to accomplish this objective, not by seeking to induce the PUC to change its policy, but rather by discouraging the filing of applications with the PUC and the ICC. To that end they agreed to take, and took the following steps.

They agreed to and did establish and maintain a joint trust fund by monthly contributions based upon each defendant's gross income. They informed their competitors that they would use this trust fund to finance opposition to all applications then pending or thereafter filed by their competitors with the PUC or the ICC; that each and every application would be opposed with or without probable cause, and regardless of its merits; and that in every case defendants would pursue their opposition through all stages of administrative and judicial review. Defendants told their competitors that they could avoid the expense and delay resulting from defendants' opposition only by abandoning pending applications and severely limiting or refraining entirely from filing further applications.

As a direct result of defendants' joint activities, the financial resources of plaintiffs and other competitors of the defendants were depleted; applications by plaintiffs and other competitors for the issuance, transfer, or registration of operating rights were defeated, delayed, or restricted; and plaintiffs and other competitors were deterred from instituting or pursuing such applications.

Defendants' joint activities effectively foreclosed plaintiffs and other competitors from access to the PUC, the ICC, and to the courts in review proceedings; it denied those agencies and the courts the benefit of facts and information required for the making of competent decisions; and it severely curtailed competition.

The rationale underlying the *Noerr-Pennington* defense does not dictate immunity for this alleged conspiracy. The purpose of defendants' joint activity was not to induce action by the affected governmental agencies, but to preclude it. That is hardly a "genuine" effort to influence governmental action in the *Noerr* sense. Prohibiting such joint activity under the Sherman Act would not "impair the power of government to take actions . . . that operate to restrain trade." *Noerr, supra,* 365 U.S. at 137. It would not impede "the ability of the people to make their wishes known to their representatives" in any legitimate sense, *id.;* nor "deprive the government of a valuable source of information." *Id.* at 139.

Nonetheless, the district court held the "sham" exception inapplicable because plaintiffs did not allege that the presentations which defendants made to the agencies and the courts were in themselves false, misleading, or lacking in evidentiary or legal support. But the question is whether the defendants sought to restrain competition by inducing restrictive governmental action, on the one hand; or, on the other, sought to restrain competition by the deterrent effect of their own joint activity.

That their joint activity took the form, in part, of solicitation of governmental action and that they made a genuine effort to support all protests as effectively as

possible would not negate a primary purpose to restrain competition directly. The means allegedly adopted by defendants to deter agency action was to discourage the filing of requests for such action by a jointly financed, well publicized program of opposing every application filed. Since all applications were to be opposed, it is irrelevant that a valid basis existed for opposing some applications. Nor is it relevant that the opposition was as effective as defendants could make it; mere token opposition would not have the requisite deterrent effect.

The purpose of this alleged conspiracy was to inflict injury upon competition directly by defendants' own joint activity. Inevitably, given the nature of the means employed, defendants' activity would also injure competitors indirectly by influencing rulings of the agencies and the courts. Here, however, that indirect injury is merely incidental; and its occurrence cannot justify application of the *Noerr-Pennington* defense. As a practical matter, to hold otherwise would make the "sham" exception inapplicable to any conspiracy to restrain trade cloaked with the mantle of a campaign to influence governmental action. *Cf. Noerr, supra,* 365 U.S. at 143-144.

Reversed and remanded for further proceedings.

HAMLIN, Circuit Judge, dissenting:

I respectfully dissent.

Section 1063 of the California Public Utilities Code provides that no highway common carrier may operate without a certificate from the Public Utilities Commission "declaring that the public convenience and necessity require such operation." In order to exercise its judgment

implementing the broad statutory standard of "public convenience and necessity" in an individual case, the Public Utilities Commission is largely dependent upon information provided by the applicant and competing carriers. See *Peninsula Motor Express,* 49 Cal. P.U.C. 807 (1950). The activities of defendants in supplying this information to the Commission is thus lawful.

In my view, the activities of the Public Utilities Commission in the implementation of the broad statutory standard is one akin to policy making. The participation of the defendants in this policy making process, through their opposition to the grant of certificates or transfers of certificates is in my opinion protected from Sherman Act liability by the decisions of the United States Supreme Court in *Noerr* and *Pennington,* despite the assumption, arising from the posture of this case, that defendants have an anti-competitive motive. The Public Utilities Commission has the power and ability to correct any abuses flowing from the activities of defendants through their opposition to the grant or transfer of certificates, see California Public Utilities Code §§ 1062, 1064, and I think that the plaintiffs must look to the Commission, rather than to the Sherman Act, for their remedy. See *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 424 F.2d 25, 30 (1st Cir. 1970). See generally, Note, Application of the Sherman Act to Attempts to Influence Government Action, 81 Harv. L. Rev. 847 (1968).

For these reasons, and for the reasons stated by Judge Sweigert in his United States District Court decision, reported in 1967 Trade Cases ¶ 72,298 (N.D.Cal. 1967), I would affirm.

Appendix B

United States District Court
Northern District of California

No. 45,073

Trucking Unlimited, et al.,
Plaintiffs,
vs.
California Motor Transport Co., et al.,
Defendants.

MEMORANDUM OF DECISION

Sweigert, J.

This is a civil antitrust class action for treble damages brought under Section 4 of the Clayton Act, 15 U.S.C. § 15, by fourteen plaintiffs, each engaged in transportation of goods by motor vehicle under regulation of the California Public Utilities Commission (PUC) and the Interstate Commerce Commission (ICC), charging nineteen individually named defendants, similarly engaged and regulated, with violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

The case is before the Court on defendants' motion under Rule 12(b)(6), Fed. R. Civ. P., to dismiss the First Amended Complaint for "failure to state a claim upon which relief can be granted."

The record consists of the Complaint, the First Amended Complaint and the pending motion. No facts beyond the pleading are presented by either party through affidavit or otherwise except as may be hereafter specifically noted.

The First Amended Complaint alleges in substance and effect (See: First Amended Complaint, par. 8, A-I, pp. 6-13) that ever since February, 1961, defendants have conspired to put plaintiffs and their other competitors out of business and for that purpose have combined their financial and other resources to carry out a consistent, systematic and uninterrupted program of instituting through the procedural machinery of the California PUC, the ICC and of the courts, opposition to every request or application (mainly applications for certification under the public convenience and necessity provisions of the California Public Utilities Act, §§ 1061-1073) made by plaintiffs or by other competitors of defendants before such agency, and to appeal any rulings of those agencies to the courts, all "without probable cause" and "regardless of the merits of the cases of plaintiffs and defendants' other competitors or of the merits of defendants' opposition."

It is further alleged that defendants have contributed to a special trust fund for this purpose according to their respective yearly gross incomes and regardless of whether a contributor has a competitive interest in any particular request or application made by plaintiffs or other competitors; that without such an agreement to jointly finance such oppositions, such oppositions would not be made at all because of the great expense involved in such

a program of protests; that, upon prevailing against plaintiffs and other competitors, defendants engage in a joint program of also resisting rehearings, reviews or appeals sought by plaintiffs or other competitors; that defendants have made known to plaintiffs and other competitors their intended program of combined and well-financed opposition in order to induce plaintiffs and their other competitors to abandon existing applications or requests and to refrain from making further applications or requests; that defendants have thus depleted the resources of plaintiffs and other competitors expended in resisting or overcoming the defendants' conspiracy of opposition; that defendants have thereby deprived the agencies and courts of the benefit of facts and information, and that defendants have defeated applications and requests of plaintiffs and other competitors on the basis of decisions which, but for defendants' combination, would not have been rendered adversely to plaintiffs and other competitors because, absent such conspiracy of opposition, no opposition would have been made.

Defendants contend that this First Amended Complaint should be dismissed upon the ground that under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) the kind of activities alleged are immune from challenge under the antitrust laws.

We recognize, of course, that a complaint should not be dismissed under Rule 12(b)(6) Fed. R. Civ. P., for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which

could be proved in support of the claim. *Moore's Federal Prac.* Vol. 2A § 12.08.

Before considering the applicability of *Noerr* and *Pennington,* we point out that the First Amended Complaint does not charge acts in restraint of trade or attempts at monopoly except in the one respect that defendants associated for the purpose of intervening in regulatory proceedings to oppose plaintiffs' applications.

There is no allegation that defendants have engaged in, or conspired to engage in, any other conduct designed to restrict the competition of plaintiffs or to monopolize the industry, e.g., rate control, restriction of service, boycott or blacklisting of plaintiffs or plaintiffs' customers or any similar conduct which might violate the antitrust laws.

Thus, plaintiffs' First Amended Complaint has been narrowly drawn to present the single question of whether defendants' association for intervention in regulatory proceedings before the PUC or the ICC—without any other alleged anti-competitive conduct—is rendered violative of the antitrust laws by reason of defendants' alleged anti-competitive purpose and intent.

As plaintiffs state in their brief, "The misuse of judicial process constitutes plaintiffs' entire factual and legal case, not an insignificant matter incidental to different facts and legal theories." (Plt. Brief filed 5/16/67; p. 42). Further, the First Amended Complaint states that "Plaintiffs, and other competitors of defendants who are joined herein or who are members of the designated class, do not complain of any activities of defendants or their conspirators toward, or in reference to,

any function of the ICC or PUC *except* as such activities pertain to the precise proceedings before such bodies." (First Amended Complaint, Par. 7, p. 5).

Noerr, supra, was an action by a group of trucking companies under Section 4 of the Clayton Act for treble damages and injunctive relief against a group of railroads alleging that the railroads had engaged a public relations firm to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business.

The trial court, disclaiming any purpose to hold illegal mere efforts on the part of the railroads to influence the passage of new legislation or the enforcement of existing law, rested its judgment against the railroads upon findings, first, that the railroads' publicity campaign, insofar as it was actually directed at lawmaking and law enforcement, was malicious in that its only purpose was to destroy the truckers as competitors and, further, was fraudulent in that it involved deceiving the lawmaking and law enforcement authorities by use of the so-called third party technique; and, secondly, that the railroads' campaign also had as an important, if not overriding purpose, the destruction of the truckers' good will among the general public and the truckers' customers, thus injuring the truckers in ways unrelated to the passage or enforcement of laws.

On appeal, the Supreme Court reversed the judgment. After stating the principle that "the Sherman Act does not prohibit two or more persons from associating together to persuade the legislature or the executive to

take particular action with respect to a law that would produce a restraint or a monopoly", the Supreme Court held that none of the factors reflected in the trial court's findings were sufficient to remove the case from this controlling principle.

Specifically, the Supreme Court held that the fact, established by the trial court's finding, that "the railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long distance freight business", would not "transform conduct otherwise lawful into a violation of the Sherman Act." (365 U.S. 127, at pp. 138, 139).

The Supreme Court further concluded that the use by the railroads in their campaign to influence governmental action of the so-called third party technique, involving deceptive and unethical public relations propaganda, would not constitute a violation of the Sherman Act because the Act is directed at trade restraints, not against political activity designed to influence governmental action. (365 U.S. 127, at pp. 140, 141).

The Supreme Court further at p. 144, concluded that, assuming application of the Sherman Act might be justified in situations in which a publicity campaign, ostensibly directed toward influencing governmental action, would be a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor" such was not the case before it since no one denied that the railroads were making a genuine and apparently successful effort to influence legislation and law enforcement practices.

Pennington, supra, was an action by the United Mine Workers (U.M.W.) for royalty payments. The defendants, certain coal companies, filed a cross-claim for damages alleging that the U.M.W. and certain other large coal companies had violated Sections 1 and 2 of the Sherman Act by: (1) entering into a Wage Agreement, which was later established under the Walsh-Healy Act by the Secretary of Labor, that provided a minimum wage for employees of contractors selling coal to the T.V.A., (2) imposing this Wage Agreement on all coal companies without regard to their ability to pay, and (3) waging a destructive and collusive price-cutting campaign in the T.V.A. "spot market" (which was exempt from the Walsh-Healy order) with the purpose of eliminating the smaller companies from the market.

After a jury trial, a verdict was returned in favor of the defendants on their antitrust cross-claim against the union. The trial court set aside the antitrust verdict against the plaintiffs, but denied a union motion for judgment notwithstanding the verdict or in the alternative for a new trial—a motion based on the ground that the union was exempt from liability under the facts of the case and also upon claimed trial court errors. The Court of Appeals affirmed denial of the union's motion, holding that the union was not exempt from liability under the Sherman Act and, further, that the instructions were adequate and that the evidence was sufficient to support the verdict.

The Supreme Court agreed that the agreement between the U.M.W. and the larger coal operators was not exempt from the antitrust laws under § 20 of the Clayton

Act, and § 4 of the Norris-LaGuardia Act. However, the Supreme Court went on to hold that the trial court had erroneously denied the motion of the U.M.W. for a new trial on the ground that there had been errors in the admission of evidence and in instructions, stating on pages 669 and 670:

> "We agree with the U.M.W. that both the Court of Appeals and the trial court failed to take proper account of the *Noerr* case. In approving the instructions of the trial court with regard to the approaches of the union and the operators to the Secretary of Labor and to the TVA officials, the Court of Appeals considered *Noerr* as applying *only* to conduct 'unaccompanied by a purpose or intent to further a conspiracy to violate a statute.' * * * Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, giving the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error."

The *Noerr* and *Pennington* cases establish the rule that violation of the Sherman Act cannot be predicated upon combined attempts to influence the passage of laws or attempts to influence public officials in the enforcement of laws even when the sole purpose and intent of the persons engaging in such activity is, and the result may be to destroy their competitors.

The reasons given by the Supreme Court for this rule are threefold: (1) That this type of combination is essen-

tially dissimilar from the type of agreements traditionally condemned by the Sherman Act; (2) That holding this kind of activity subject to the sanctions of the Sherman Act would impair the power of government to act upon the basis of information provided to it by interested parties, and (3) That a construction of the Sherman Act, bringing this kind of activity within its purvue, would raise important constitutional questions, e.g., the right to petition.

Thus, the Supreme Court has in effect weighed these factors in balance with the factor of the antitrust intent or result of certain kinds of concerted activity and has concluded that the latter factor must be risked in order to subserve other governmental needs and political rights.

The *Noerr* doctrine has been recognized and applied in *United States v. Johns-Mansville,* 259 F.Supp. 440 (E.D. Pa. 1966) (involving alleged combination for informal approaches to municipal authorities to obtain restrictive specifications for certain pipe with intent to injure competitiors); *A.B.T. Sightseeing v. Gray Line,* 242 F.Supp. 365 (S.D.N.Y. 1965) (involving alleged combination to lobby lawmaking and administrative agencies of the City of New York with intent to ultimately eliminate competition); *Harmon v. Valley Natl. Bank,* 339 F.2d 564 (9th Cir. 1964) (involving alleged combination by defendants with the Attorney General of Arizona to commence a court action for the purpose of injuring a competitor); *Assn. of Western Ry. v. Riss,* 299 F.2d 133 (D.C. Cir. 1962) (involving an alleged combination of four Ry. Associations to influence legislative and administrative action with intent to destroy competition); and in *Baltimore &*

Ohio Ry. v. New York, N. H. & H. R. Co., 196 F.Supp. 724 (S.D.N.Y. 1961) (involving alleged combination to propagandize the ICC to impose certain rates on competitors together with the filing of a suit to obtain enforcement of the ICC rates).

In *Woods v. Aluminum Co.*, 36 F.R.D. 107 (S.D. Tex. 1963), the court refused to apply the *Noerr* doctrine on a motion for summary judgment where the allegation was to the effect that defendants had conspired to file "false nominations" with the Texas Railroad Commission (whose regulatory Act provided that every oil producer should file monthly forecasts ("nominations") of the amount of gas that could be produced and sold from oil fields. In that case, however, the court, posing the question whether the conduct complained of was "political in nature" held that, if defendants were enjoined from conspiring to submit "false nominations" with the Railroad Commission, (there are no such charges in our pending case) they would not thereby be deprived of any constitutional right to petition or participate in the governmental process; that defendants would only be prohibited from undertaking "certain joint business behavior which would not remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr;* and, further, that, assuming plaintiff's activities were "political" in nature, the complaint also tendered the issue (unlike the pending case) whether defendants had conspired *in other respects,* apart from the filing of false nominations, to restrain competition."

In *Harmon, supra,* a civil action brought under the antitrust laws, our Court of Appeals, reversing dismissal

of the action on ground of failure to state a claim, considered an allegation to the effect that defendants had combined to induce the Attorney General of Arizona (alleged to have been a participant in the combination) to file a court suit under a state statute (authorizing the Attorney General to bring such action against building and loan associations in the event of certain irregularities specified in the statute) which suit resulted in placing Arizona S & L Association in receivership and closing its business. In the course of the receivership plaintiffs' contractual rights, acquired in dealings with the Arizona S & L Association, had been disallowed by the state court receiver.

The court, discussing the applicability of *Noerr, supra,* (and also of *Pennington, supra,* and *Association of Western Railways v. Riss, supra*) agreed that *Noerr* would apply whether or not the proceeding brought by the Attorney General had substantive merit and, that defendants' conduct (informing the Attorney General of alleged irregularities and persuading him to take the action) "would be essentially political in nature" and immune from attack for the reasons set forth in *Noerr.*

The court held, however, that the complaint in that particular case (unlike the First Amended Complaint here) could be read as alleging defendants' joint effort to influence the Attorney General "was but one element in a larger, long continued scheme to restrain and monopolize" the financial industry, pointing out that there was nothing in the complaint which would preclude proof that the alleged conspiracy was aimed, in part, directly at the re-

financing arrangements between plaintiff and the Arizona S & L Association.

In *Washington Brewers v. United States,* 137 F.2d 964, (9th Cir. 1943) a criminal prosecution against the defendants, Brewers Institute and others, for violation of the Sherman Act §§ 1 and 3, the court, although affirming the trial court's refusal to dismiss the indictment (alleging concerted fixing of prices) on demurrer, pointed out that, insofar as the indictment charged defendants with conspiring to influence the formulation of state policy concerning liquor and with combining to police the enforcement of state laws, it charged no antitrust offense saying: "We know of no reason why brewers, like other people, may not jointly advocate state legislation thought by them to be desirable, nor why they may not single or in concert, aid the authorities *in the policing of any legislation which it is within the competency of states to adopt.*" (emphasis added).

Plaintiffs first contend that the doctrine of *Noerr* and *Pennington, supra,* is applicable only to activities directed to the legislative branch of government for the enactment of laws or to the executive branch for the enforcement of laws and that the doctrine is not applicable to activities conducted through the procedural machinery of the courts or of regulatory agencies like the California PUC or the ICC in which certain quasi judicial functions are vested.

Although it is true that in *Noerr* and *Pennington,* the court was speaking in terms of the "legislative" and "executive" branches of government there involved, this Court is of the opinion that the rationale of the *Noerr-*

Pennington doctrine is clearly and equally applicable to activities directed to the courts or to regulatory agencies for the purpose of taking positions on points of fact or law pertinent to the regulatory acts.

The gist of the *Noerr-Pennington* doctrine is that concerted activities "conducted along lines normally accepted in our political system" are not rendered violative of the antitrust laws even though the purpose or result may be to injure a competitor.

The right of access to courts and regulatory agencies is just as much a political right as the right of access to the legislative and executives branches. In fact, the Supreme Court has expressly recognized that the right of access to judicial agencies is within the protection of the First Amendment right of petition and has held that a statute impairing such right is, therefore, unconstitutional, *NAACP v. Button,* 371 U.S. 415 at 430 (1963).

Both the ICC and PUC Acts, involved in the pending case, are framed in such manner as to invite intervention by members of the regulated industry and other interested persons in opposition to applications for certificates of the kind here involved. The regulatory agencies often encourage such intervention in order to provide them with pertinent information concerning public convenience and necessity without which these applications would be in effect mere one-sided proceedings.

It seems clear that, under the rationale of *Noerr,* the mere fact of association by defendants for the purpose of resort to the regulatory agencies of the courts in order to oppose applications by others in the manner provided by law could not be held a violation of the antitrust law—

even if the intent of defendants is, or the result might be, the injury of competitors.

The Noerr Doctrine

Plaintiffs next contend that defendants' purported access to and use of the procedures of the regulatory agencies and of the courts in the exercise of their rights is mere "sham" within the meaning of that term as used by the Supreme Court in *Noerr, supra.*

However, the First Amended Complaint does not allege that all or any of the oppositions mentioned in the pleading were filed or were to be filed without probable cause. The pleading carefully refrains from charging that the oppositions were false, misleading to the agency or lacking in factual allegation and legal theory arguably relevant to the function of the regulatory agency in determining public convenience and necessity. The allegation is merely that defendants combined to file them "with or without probable cause". This allegation falls far short of charging that the oppositions would not be upon probable cause. On the contrary, it implies that all or at least some of the oppositions may have been filed *with* probable cause.

Nor does the First Amended Complaint allege that all or any of the applications made by plaintiffs (which defendants oppose) were meritorious under the applicable regulatory acts. The allegation carefully refrains from alleging that they were. Plaintiffs merely allege that defendants combined to oppose their applications "regardless of the merits of" the applications. This falls short of alleging that the applications were meritorious. On the

contrary, it implies that all or at least some might be without merit.

Plaintiffs, themselves, in their Brief filed 5/16/67, p. 8, present certain exhibits showing that 21 out of 40 matters which had reached the decision stage as of 11/28/61, resulted in action favorable to defendants either because the opposed application was denied by the agency in whole or in part or substantially reduced in scope or because the application was dismissed by the applicant after defendants appeared in opposition.

In the light of the pleading, considered either alone or in the light of such exhibit, and in a light most favorable to plaintiffs, it is impossible for this Court to say that the pleading supports plaintiffs' conclusionary claim of "sham" as that term was used in *Noerr*.

On the contrary, just as the findings in *Noerr* negatived the theory of sham, so also the allegations here negative that theory and show, as in *Noerr*, that, whatever the ultimate purpose and intent of defendants may have been, the oppositions were not, so far as the pleading is concerned, sham but were genuine and in part successful.

To hold that this complaint alleges an antitrust violation would be to hold in effect that defendants are liable in damages for having associated to present their oppositions to the agencies regardless of the merit of the oppositions or lack of merit in the applications opposed—solely because defendants, according to the complaint, entertained an ulterior motive of injuring or destroying defendants' competition.

Whatever the law would be without *Noerr*, the Supreme Court has resolved the problem of bad purpose or intent

vis a vis freedom of resort to public officials and agencies by holding that the latter is to be subserved notwithstanding the risk of tolerating an anti-competition purpose of such resort and a possible anti-competitive result.

There is no good reason why regulated business firms may not freely submit their information and views on public convenience and necessity to the regulatory agency without subjecting themselves to antitrust attack upon the ground that their purpose was to restrict competition —an objective which may be easily implied because it is inherently involved in the regulatory act, itself, which is designed to restrict entries into the industry to those justified by findings of public convenience and necessity. In our opinion, the rationale of *Noerr* is such that this result is not required.

As impliedly recognized in *Noerr,* the "probable cause" or "merit" of such applications or oppositions as are presented to the regulatory agency (or to the legislative or other executive officials) can be left to their responsible expertise (and appropriate judicial review) rather than be presented to the courts in the guise of an antitrust suit.

The gist of plaintiffs' complaints is that the resort of defendants to the regulatory agencies to oppose and thereby put plaintiffs to the proof in support of their applications has made it "exceedingly expensive" for plaintiffs and others to obtain certificates.

Unfortunately, proceedings before courts or regulatory agencies, if opposed, entail expense in terms of time and money for both sides. But, this is inherent—so much so that, as plaintiffs say in their own brief, "Individually, the members of the Dwyer group" (defendants) "would

not take the action against plaintiffs which their conspiracy has allowed them to take" (Plt. Brief of 5/16/67, p. 6, line 6) and in their Amended Complaint they make the significant statement that decisions of the agency "but for defendants' combination and conspiracy, would not have been rendered *adverse* to plaintiffs and other competitors of defendants, *because no opposition would otherwise have been commenced.*" (Amended Complaint, par. 8(4)10, p. 12). (emphasis added).

The Patent Cases

Plaintiffs mainly rely upon cases involving the claim that combinations involving the threat or actual commencement of patent infringement suits were violations of the antitrust laws.

In *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963) the United States sued to restrain Singer, the sole American manufacturer of certain sewing machines, from conspiring with two of its competitors, an Italian manufacturer (Vigorelli) and a Swiss manufacturer (Gegauf) to restrain interstate and foreign trade in sewing machines, specifically certain Japanese competition.

The District Court ruled for defendants on the ground that there did not appear to be a concert between Singer and its alleged co-conspirators to restrain the Japanese competition and that Singer was merely acting within its right to protect its own patent. The Supreme Court reversed, holding that, according to its interpretation of the trial court's findings, a conspiracy to exclude Japanese competition in violation of the Sherman Act was shown.

The findings were to the effect that defendants had combined (1) to withdraw opposition to each other's applications in the Patent Office in order to secure broad claims regardless of validity; (2) to cross-license and assign their respective patents on a world-wide royalty free basis, and (3) assignment of an American patent (owned by the Swiss manufacturer [Gegauf] in order that this patent could be more effectively enforced by Singer in the United States against the Japanese competition through infringement suits and certain Tariff Commission proceedings.

The Court said:

> "Thus, by entwining itself with Gegauf and Vigorelli in such a program Singer went far beyond its claimed purpose of protecting its own 401 machine—it was protecting Gegauf and Vigorelli, the sole licensees of the patent at the time, under the same umbrella. This the Sherman Act will not permit. * * * The fact that the enforcement plan likewise served Singer is of no consequence, the controlling factor being the overall common design, i.e., to destroy the Japanese sale of sewing machines in the United States by placing the patent in Singer's hands the better to achieve this result. It is this concerted action to restrain trade that condemns the transaction under the Sherman Act. * * * It is well settled that 'beyond the limited monopoly which is granted, the arrangements under which the patent is utilized are subject to general law. * * * By aggregating patents in one control the holder of the patents cannot escape the prohibitions of the Sherman Act. That Act imposes strict limitations on the concerted activities in which patent owners may lawfully engage."

In *Kobe v. Dempsey Pump Co.*, 198 F.2d 416 (10th Cir. 1952), an action for patent infringement, defendants counter-claimed alleging that plaintiff's misuse of its patent monopoly, including, among other things, the bringing of an infringement suit, violated Sections 1 and 2 of the Sherman Act.

Affirming a judgment for defendants on their antitrust counterclaim, the Court, dealing with plaintiff's contention that its monopolistic practices did not reach the defendants until the commencement of the infringement suit and that to allow recovery of damages would be a denial of free access to the courts, recognized that although free and unrestricted access to the courts should not be denied or imperiled in any manner, the courts should not be made a vehicle for maintaining and carrying out an unlawful monopoly having for its purpose the elimination and prevention of competition, adding, however, on p. 425:

> "We have no doubt that, *if there was nothing more than the bringing of the infringement action* (emphasis added) resulting damages could not be recovered, but that is not the case. The facts as hereinbefore detailed are sufficient to support a finding that, although Kobe (plaintiff) believed some of its patents were infringed, the real purpose of the infringement action . . . was to *further the existing monopoly* (emphasis added) and to eliminate Dempsey as a competitor. The infringement action and the related activities, of course, in themselves were not unlawful, and *standing alone would not be sufficient to sustain a claim for damages* (emphasis added) which they may have caused, but *when considered with the entire monopolistic scheme which preceded them*, (emphasis added) we think, as the trial court

did, that they may be considered as having been done to give effect to the unlawful scheme. . . ." distinguishing *Virtue v. Creamery Package Co.*, 227 U.S. 8 (1913) and *International Visable Systems v. Remington Rand*, 65 F.2d 540 (6th Cir. 1933) as involving "single and isolated actions not preceded by a long history of unlawful monopolization," 198 F.2d 416, at 425.

In *Lynch v. Magnavox*, 94 F.2d 883, 888-890 (9th Cir. 1938), the Court reversed a dismissal on demurrer of an antitrust complaint which alleged that defendants, who had cross-licensed their respective patents, had combined to restrain competition and to monopolize the radio speaker business by threatening radio manufacturers with a ruinous commercial campaign of letter writing and by threatening and commencing in bad faith groundless actions against the manufacturers and their customers for infringement of their allegedly invalid patents in order to force the manufacturers to discontinue purchase of radio speakers from anyone but defendants.

The Court held that, assuming each of the alleged acts to be lawful in themselves, the combination would be a violation of the antitrust laws if its purpose was to restrain competition or to attempt monopoly, saying: "In other words, if the purpose of the plan is to effect a monopoly or to fix prices . . . then the act is violated by use of any means to that end, *including a cross-licensing agreement.*" (emphasis added).

The theory of these cases, as set forth in *Mercoid v. Mid-Continent*, 320 U.S. 661, 665-666 (1943), is that a patentee has been given a privilege of limited monopoly

conditioned, however, by a public purpose; that, although he may enforce his patent rights (either directly obtained or acquired from others under assignment or license), he may not use his limited monopoly in such manner as enables him to acquire a broader monopoly than is within the strictly confined and precise terms of his patent grant; that the method by which his monopoly is sought to be extended is immaterial and that, when the patent is thus diverted from its statutory purpose, the antitrust laws apply.

Further, in these cases the combinations involved other acts of the conspirators, e.g., illegal cross-licensing schemes and similar activities, of which the infringement suits, or threats thereof were merely the effectuating means.

In none of these patent cases did the court hold or say that mere association for the bringing or threatening of a patent infringement suit—*without more*—is, itself, an antitrust violation merely because the associates may contemplate injury to a competitor.

On the other hand, it was early recognized in *International Visable Systems v. Remington-Rand*, 65 F.2d 540 (6th Cir. 1933) at 542, that the mere bringing of a patent infringement suit, even if alleged to have been brought maliciously and with the purpose of monopolizing an industry, does not state a violation of Section 2 of the Sherman Act (attempt to monopolize, i.e., regardless of concert of action) the Court saying:

> "The suit brought by appellee for the infringement of its patents cannot of itself be characterized as an attempt to monopolize trade or commerce. It was

> nothing more than a lawful method of protecting appellee's claimed monopoly under the patent laws * * * Moreover, the declaration in the petition that the suits for infringement were brought against appellant 'maliciously and without probable cause' adds nothing to the weight of the claim that the infringement suit was an attempt to monopolize trade or commerce", citing *Virtue v. Package Creamery*, 227 U.S. 8, 38 (1912).

In any event, the defendants in this pending case have not combined to bring patent infringement suits nor are they grantees of any monopoly which could possibly have been misused. They are simply certificated business entities in an industry which is competitive within a framework of regulation according to standards of public convenience and necessity.

It is, therefore, unnecessary to decide whether the patent cases indicate a special area to which the immunization doctrine of *Noerr* does not extend.

We only hold that the narrowly framed allegations of this Amended Complaint are such that the activities for which defendants have associated are and must be held immune from the antitrust laws—even though their ultimate purpose may be to reduce, injure or destroy competition.

The pleading has already been once amended and presumably, plaintiffs have gone as far as they can truthfully go toward alleging an antitrust violation. The First Amended Complaint will, therefore, be dismissed without leave to amend subject to the condition that, if plaintiffs move for leave to amend within fifteen (15)

days from the date of this order, the Court will consider whether their amended pleading is sufficient to state a claim upon which relief could be granted.

Dated: October 5th, 1967.

W. T. Sweigert,
United States District Judge

Original Filed October 6, 1967
Clerk, U.S. Dist Court,
San Francisco.

Appendix C

United States District Court
For the Northern District of California
Civil Action No. 45073

Trucking Unlimited, a corporation, Don D'Onofrio, an individual, dba Donofrio Drayage-Record Express, B. C. Lawson Drayage, Inc., a corporation, Cargo Carriers, Inc., a corporation, Meek Trucking Company, a corporation, L.D.S. Truck Lines, a corporation, G. A. Hutchinson & Son Draying, a corporation, Frank L. Nolan, Jr., an individual formerly a co-partner of Frank Nolan Drayage Co., American Transfer Co., a corporation, Coast Drayage, a corporation, Ruddway Drayage Company, a corporation, Rose J. Antonini, Virgil J. Antonini, Administrator of the Estate of Louis E. Antonini, and Virgil J. Antonini, a partnership, dba Antonini Fruit Express, Johansen's Superior Truck Line, Inc., a corporation, Pozas Bros. Trucking Co., a corporation, Plaintiffs,

vs.

California Motor Transport Co., a corporation, Delta Lines, Inc., a corporation, Di Salvo Trucking Co., a corporation, Oregon Nevada California Fast Freight, Inc., a corporation, Southern California Freight Lines, Ltd., a corporation, Pacific Intermountain Express Co., a corporation, Pacific Motor Trucking Company, a corporation, Ringsby Truck Lines, a corporation, Shippers Express Company, a corporation, Sterling Transit Company, Inc., a corporation, Valley Motor Lines, Inc., a corporation, T.I.M.E. Freight, Inc., a corporation, Walkup's Merchants Express, a corporation, Willig Freight Lines, a corporation, Garden City Transportation Co., Ltd., a corporation, California Cartage Company, Inc., a corporation, Boulevard Transportation Company, a corporation, Callison Truck Lines, Inc., a corporation, Ringsby-Pacific Truck Lines, a corporation (formerly Fortier Transportation Company), Defendants.

FIRST AMENDED COMPLAINT
(Jury Demanded)
Cause of Action of Plaintiff
B. C. LAWSON DRAYAGE, INC.

Plaintiff complains of defendants as follows:

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted, against defendants under Title 15, Section 15 and 26 U.S.C., being a part of the antitrust laws of the United States, commonly known as the Clayton Act, for violations of the Sherman Act and the Clayton Act. The purpose of this action is to obtain injunctive relief and to recover damages, as provided by law, for injuries to plaintiff's business and property within the period allowed by law, which injuries proximately resulted from defendants' violations of the antitrust laws of the United States.

2. The unlawful acts and violations of law herein described have been conceived, carried out, made effective and performed in major part within the above district and division and have affected areas elsewhere in California and in other states.

Parties

3. Plaintiff is a corporation organized and existing under the laws of the State of California.

4. Plaintiff was at all times herein mentioned a highway carrier operating pursuant to a certificate or permit duly issued by the California Public Utilities Commission (P.U.C.) and pursuant to the authority of the Interstate Commerce Commission (I.C.C.). As a highway carrier, plaintiff was at all times herein mentioned in the business of transporting goods and packages throughout areas of California and of rendering to customers other services incidental to the actual transportation of such goods and packages.

5. The defendants are all corporations, each organized and existing under the laws of one of the states of the United States. Each defendant is found and transacts business within the above district and elsewhere in California and in some cases in other states. Each is engaged in the business of transporting goods and packages throughout areas of California and to and from other states and of rendering to customers other services incidental to the actual transportation of goods and packages.

Interstate Commerce

6. The violations herein alleged have occurred within the stream of interstate commerce and substantially, directly and adversely affect interstate commerce. All defendants are interstate instrumentalities who have improperly used their power over interstate commerce so as to adversely affect, restrict and impinge upon local commerce.

The Functions of the Regulatory Agencies as Involved in This Complaint

7. The grants of operating rights, consents to transfer rights or registrations of rights sought by plaintiff and other competitors of defendants and the filing of complaints by defendants against their competitors, as set forth in the following section entitled "The Violations", were initiated by the filing of formal applications, petitions or complaints with the California P.U.C. or I.C.C. Protests or oppositions to such filings were likewise initiated by similar formal writings. The proceedings or machinery by which such applications, petitions or complaints

were adjudicated were judicial in nature. Such proceedings generally involved formal filings, service of process, formal notice as regulated by statute or regulation, discovery, including the taking of depositions, issuance of subpoenas and subpoenas duces tecum in accordance with identical procedures used in the Superior Courts of California, the taking of oral or written testimony under oath, findings, conclusions, decisions and opinions, the use of precedent in the decisional processes and the making of a record of proceedings and testimony. Plaintiff and other competitors of defendants who are joined herein or who are members of the designated class do not complain of any activities of defendants or their co-conspirators toward or in reference to any function of the I.C.C. or P.U.C. except as such activities pertain to the precise proceedings before such bodies here described.

The Violations

8. On information and belief, plaintiff alleges that defendants have combined, contracted and conspired to restrain trade and commerce, have monopolized, attempted to monopolize and conspired to monopolize trade and commerce in the transportation of goods and packages in the above district and elsewhere, all in violation of Sections 1 and 2 of the Sherman Act. The violations of the Sherman Act constitute the behavior of defendants as follows:

A. Beginning in or about February 1961, and continuously thereafter, defendants and their co-conspirators, constituting the largest common carriers in the State of California and the Western United States, formed and entered into a conspiracy for

the agreed aim and purpose of putting their competitors, including plaintiff, out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, and of monopolizing the highway common carriage business in California and elsewhere.

B. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have combined and committed their financial and other resources and utilized such resources to engage in the activities set forth herein.

C. In order to accomplish the purposes of the conspiracy, the defendants have agreed jointly to carry out a consistent, systematic, and uninterrupted program of instituting judicial proceedings or actions in the California Public Utilities Commission, the Interstate Commerce Commission, the Supreme Court of California, the United States District Courts, the United States Courts of Appeal, and the United States Supreme Court in opposition to, with but a few and insignificant exceptions, every request, application or action for operating rights, transfers of rights, or registrations of rights made or brought by plaintiff and other competitors of defendants before such agencies and courts. The conspiracy included the agreement to seek rehearings or take appeals to and through the various levels of the courts if such proceedings were lost by defendants and their co-conspirators or to oppose rehearings or appeals taken by plaintiff and other competitors if plaintiff and other competitors lost any such proceed-

ings. Defendants and their co-conspirators agreed to resist and oppose at all levels. The conspiracy included the agreement to jointly finance all opposition which, if such opposition were not so financed, would not have been made at all because of the great expense involved in such a program of protests.

D. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have instituted protest or opposition proceedings against plaintiff's and other competitors of defendants' applications or requests for rights, transfers of rights, and registrations of rights in the P.U.C. and I.C.C., and have filed complaint proceedings against plaintiff and other competitors of defendants in the P.U.C. Upon losing such proceedings, the defendants have filed for or sought rehearings, reviews or appeals of such decisions below, and accordingly have instituted proceedings for rehearing, review or appeal in the agencies and courts set forth herein. Upon prevailing against plaintiff and other competitors of defendants in the P.U.C. or I.C.C., the defendants have effected a joint program of resisting rehearings, reviews or appeals on the part of plaintiff and other competitors of defendants in the agencies and courts set forth herein.

E. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, defendants have as a matter of policy instituted the proceedings and actions set forth herein with or without

probable cause, and regardless of the merits of the cases of plaintiff and other competitors of defendants, or of the defendants' opposition.

F. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have established a trust fund to finance their conspiracy, and each defendant has contributed finances to the fund in monthly payments in amounts proportionate to each defendant's yearly gross income, regardless of whether such contributing defendant participated in or had a competitive interest in the proceedings instituted by and on behalf of the defendants' conspiracy as set forth herein.

G. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants have publicized and made known to defendants' competitors, including plaintiff,

(1) That the defendants' conspiracy, with its combination of financial wealth and resources, would be used to oppose, with but a few and insignificant exceptions, all applications, requests, or actions pending on behalf of plaintiff and other competitors of defendants at the time the conspiracy commenced, or to be made or brought by plaintiff or other competitors of defendants at all times thereafter;

(2) That such opposition proceedings would be instituted and pursued by defendants through the judicial machinery of the agencies and courts as set forth herein; and

(3) That it would be expeditious and wise for plaintiff and other competitors of defendants to terminate, abandon or surrender existing applications, requests or actions, and to limit severely or refrain entirely from making or bringing further applications, requests or actions for rights, transfers or registrations in the agencies and courts set forth herein, lest plaintiff or such other competitors of defendants be met with the combined wealth and resources of defendants.

H. Pursuant to conspiracy, the defendants have deliberately and purposefully achieved the agreed upon aims, as follows:

(1) The defendants have depleted the resources of plaintiff and other competitors of defendants who, even where granted the rights, transfers or registrations requested, have expended the wherewithal and resources required to remain in business or to compete successfully in resisting or overcoming the defendants' conspiracy.

(2) The defendants have delayed the ultimate granting of rights, transfers or registrations sought by plaintiff and other competitors of defendants so as to damage severely their ability to compete or remain in business even though all or part of the rights, transfers and registrations were ultimately granted.

(3) The defendants have successfully discouraged and deterred plaintiff and other competitors

of defendants from initiating or pursuing requests, applications or actions for rights, transfers or registrations.

(4) The defendants have practically and actually made unavailable to plaintiff and other competitors of defendants free and unlimited access to the judicial machinery of the agencies and courts as set forth herein.

(5) The defendants have clogged and impeded the judicial machinery of the agencies and courts set forth herein, thereby denying plaintiff and other competitors of defendants free and unlimited access thereto.

(6) The defendants have harassed and obstructed plaintiff and other competitors of defendants.

(7) The defendants have harassed and obstructed the judicial machinery of the agencies and courts set forth herein.

(8) The defendants have abused the judicial machinery of the agencies and courts set forth herein.

(9) The defendants have denied to the agencies and courts the benefit of facts and information, competently presented through established judicial procedures, upon which such agencies and courts make their decisions.

(10) The defendants, acting in concert, became capable of instituting opposition proceedings as set forth herein and have thereby defeated or restricted, in whole or in part,

rights, transfers and registrations requested or applied for by plaintiff and other competitors of defendants on the basis of decisions rendered on the merits of the issues presented. Such decisions which, but for the defendants' combination and conspiracy, would not have been rendered adverse to plaintiff and other competitors of defendants, because no opposition would otherwise have been commenced.

l. In order to accomplish the purposes of the conspiracy, and pursuant to agreement, the defendants, being possessed of monopoly power by reason of the combination of their wealth and resources, have in fact performed and done the acts, and have employed the means alleged herein.

Effect of Violations

9. By virtue of the violations of the antitrust laws on the part of defendants, competition of plaintiff and other competitors of defendants has been restrained, lessened, impaired and eliminated. The judicial machinery of the P.U.C. and the I.C.C. and the courts has been effectively closed to plaintiff and other competitors of defendants. Defendants have succeeded in defeating, delaying or restricting rights sought by plaintiff and other competitors of defendants, regardless of the merits, in situations where no protest would have been made at all except for the unlawful combination and purpose of the conspiracy and combined strength of the defendants. The defendants have, in effect, become the regulators of the grants of

rights, transfers and registrations to plaintiff and other competitors of defendants rather than the P.U.C., the I.C.C. and the courts. The value of the businesses of the plaintiff and other competitors of defendants has diminished because of difficulty encountered in transferring rights to willing purchasers. As a result of the foregoing, the defendants have acquired, implemented, fostered and aggrandized their economic and monopoly power.

Damages

10. As a direct and proximate result of the violations set forth herein, the value of plaintiff's business and property has been substantially injured, its profits seriously impaired, plaintiff has been required to make extensive expenditures as a result of defendants' actions, and it has suffered a loss of value, goodwill and reputation to its business, all in an amount presently unknown to plaintiff.

Second Cause of Action of Plaintiff
B. C. LAWSON DRAYAGE, INC.

1. Plaintiff repleads the First Cause of Action with the exception of subparagraph 8A.

2. Prior to 1961, pursuant to prior decisions rendered by the P.U.C., grants of operating rights to common carriers were liberally given. Applications by truckers for such rights were granted as a matter of course, with some of them encountering no opposition whatsoever and the remaining encountering only sporadic opposition. Also prior to 1961, defendants and other co-conspirators took full advantage of the above-described P.U.C. decisions, and to the extent that they desired them, applied for and

received extensive operating rights. Also prior to 1961, applications by truckers for the transfer of rights were freely granted, with most of them encountering no opposition whatsoever, and the remaining few encountering only sporadic opposition. Beginning in 1963, the I.C.C., upon granting of applications of truckers, permitted P.U.C. operating rights to be registered as part of the interstate authority of applying truckers.

3. Beginning in or about February 1961 and continuously and uninterruptedly through the dates of the filing of the complaint and this first amended complaint, defendants and their co-conspirators combined for the agreed aims and purposes of (a) denying plaintiff and other competitors of defendants the business advantage otherwise available to them by virtue of the policy of the P.U.C.; (b) denying plaintiff and other competitors of defendants the business advantage of having their applications for rights, transfers and registrations heard and granted without enervating, ceaseless and financially debilitating opposition; (c) thwarting the policy and aims of the P.U.C. in liberally granting operating rights; (d) depriving plaintiff and other competitors of defendants of valuable operating rights by rendering such rights difficult and expensive to transfer to a buyer or register with the I.C.C.; and (e) themselves becoming, in effect, the regulators, rather than the P.U.C., the I.C.C. and the courts, of the granting of operating rights, transfers and registrations by plaintiff and other competitors of defendants.

Causes of Action of Plaintiff
CARGO CARRIERS, INC.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is the assignee of all of the right, title and interest in the claims here asserted of B.B.S. Transportation Co., Inc.

Causes of Action of Plaintiff
L.D.S. TRUCK LINES

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
JOHANSEN'S SUPERIOR TRUCK LINE, INC.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
POZAS BROS. TRUCKING CO.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
TRUCKING UNLIMITED

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
G. A. HUTCHINSON & SON DRAYING

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is the assignee of all of the right, title and interest in the claims here asserted of G. A. Hutchinson dba G. A. Hutchinson & Son Draying.

Causes of Action of Plaintiff
DON D'ONOFRIO,
dba DONOFRIO DRAYAGE-RECORD EXPRESS

1. Plaintiff repleads the entire First Cause of Action with the exception of Paragraph 3 and the Second Cause of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is an individual doing business as Donofrio Drayage-Record Express.

Causes of Action of Plaintiff
FRANK L. NOLAN, JR.

1. Plaintiff repleads the entire First Cause of Action with the exception of Paragraph 3 and the Second Cause of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is an individual, formerly a copartner of Frank Nolan Drayage Co.

Causes of Action of Plaintiff
COAST DRAYAGE

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
AMERICAN TRANSFER CO.

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
RUDDWAY DRAYAGE COMPANY

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Causes of Action of Plaintiff
MEEK TRUCKING COMPANY

1. Plaintiff repleads the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiff is the assignee of all of the right, title and interest in the claims here asserted of W. H. Meek, Jr. dba McDermott Trucking Co.

Causes of Action of Plaintiff
ROSE J. ANTONINI, VIRGIL J. ANTONINI
and VIRGIL J. ANTONINI, Administrator

1. Plaintiff repleads the entire First Cause of Action with the exception of Paragraph 3 and the Second Cause

of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

2. Plaintiffs Rose J. Antonini, Virgil J. Antonini and Virgil J. Antonini, Administrator, are in partnership doing business as Antonini Fruit Express.

Class Action

Plaintiffs complain of defendants as follows:

1. All plaintiffs above named, acting on their own behalf and on behalf of all competitors of defendants, as hereinafter defined, similarly situated, as a class, bring this cause of action pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure for treble the amount of damages suffered by them and each member of the class as a direct result of the defendants' violations of the antitrust laws of the United States and for injunctive relief.

2. Plaintiffs are informed and believe that within the State of California there are in excess of one hundred highway carriers who have been damaged by the defendants as described herein. Such carriers are:

A. Those carriers who have been harassed and financially depleted, weakened and damaged by the conduct of defendants alleged herein;

B. Those carriers who have been harassed and financially depleted, weakened and damaged and who have been restricted in, limited in, or precluded from extending their operating rights and capabilities by the conduct of the defendants alleged herein;

C. Those carriers who have been harassed and financially depleted, weakened and damaged and who have purchased or sold, or attempted to purchase or sell, existing carrier rights but who have been limited in, restricted from or precluded from consummating such purchases or sales because of the conduct of defendants alleged herein. The named plaintiffs and all of the above-described carriers are a class of persons herein called "competitors of defendants."

3. Because of the large number of competitors of defendants and the expense and burden to the parties and to the Court in litigating their claims separately, it is impractical to bring them all individually before the Court at this time.

4. The nature of the offenses charged and the commerce involved present substantial questions of law and fact common to the named plaintiffs and all other competitors of defendants; and the named plaintiffs fairly insure adequate representation of the interests of the entire class of competitors of defendants.

5. The named plaintiffs and the competitors of defendants, and each of them, hereby replead the First and Second Causes of Action of plaintiff B. C. Lawson Drayage, Inc. as though fully set forth herein.

Prayer

Wherefore, the plaintiffs pray:

A. That the conduct of the defendants as herein alleged be adjudged and decreed to be in violation of the antitrust laws;

B. That judgment be entered against the defendants for treble the amount of damages suffered by each named plaintiff as a result of the violations of the antitrust laws alleged herein as required by Section 4 of the Clayton Act (15 U.S.C. 15).

C. That each member of the class represented by plaintiffs who has been injured by the violations of the antitrust laws alleged herein be allowed to intervene in this action either before or after trial for the purpose of proving the amount of damages suffered by it, and that judgment be entered against defendants for treble the amount of damages so proved.

D. That plaintiffs be awarded their costs of suit, including reasonable attorneys' fees, as required by Section 4 of the Clayton Act.

E. That plaintiffs have such other and further relief as the Court shall deem just and proper.

F. That the Court issue an injunction against defendants as is herein requested, and such orders as are appropriate.

A jury trial is hereby demanded.

Dated: February 16, 1967.

Broad, Busterud & Khourie,
By Michael N. Khourie,
Attorneys for Plaintiffs.

Appendix D

RELEVANT PROVISIONS FROM THE U.S. CONSTITUTION, FEDERAL AND STATE STATUTES, AND RULES OF THE INTERSTATE COMMERCE COMMISSION AND CALIFORNIA PUBLIC UTILITIES COMMISSION.

I. U.S. Constitution

First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

II. Sherman Antitrust Act

15 U.S.C. § 1:

Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

15 U.S.C. § 2:

Monopolizing trade a misdemeanor; penalty.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, ..."

15 U.S.C. § 4:

Jurisdiction of courts; duty of United States attorneys; procedure.

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; . . ."

III. Clayton Antitrust Act

15 U.S.C. § 15:

Suits by persons injured; amount of recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. § 25:

Restraining violations; procedure.

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, ..."

15 U.S.C. § 26:

Injunctive relief for private parties; exception.

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execu-

tion of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

IV. Interstate Commerce Act

49 U.S.C. § 306:

Application for Certificate of Public Convenience and Necessity.

"(a)(1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. . . .

. . . . . .

(6) On and after October 15, 1962 no certificate of public convenience and necessity under this chapter shall be required for operations in interstate or foreign commerce by a common carrier by motor vehicle operating solely within a single State and not controlled by, controlling, or under a common control

with any carrier engaged in operations outside such State, if such carrier has obtained from the commission of such State authorized to issue such certificates, a certificate of public convenience and necessity authorizing motor vehicle common carrier operations in intrastate commerce and such certificate recites that it was issued after notice to interested persons through publication in the Federal Register of the filing of the application and of the desire of the applicant also to engage in transportation in interstate and foreign commerce within the limits of the intrastate authority granted, that reasonable opportunity was afforded interested persons to be heard, that the State commission has duly considered the question of the proposed interstate and foreign operations and has found that public convenience and necessity require that the carrier authorized to engage in intrastate operations also be authorized to engage in operations in interstate and foreign commerce within limits which do not exceed the scope of the intrastate operations authorized to be conducted. . . ."

49 U.S.C. § 307:

Issuance of Certificate—Issuance authorized to qualified applicants for regular routes and between fixed termini.

"(a) Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be

authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. . . .

(b) . . . ."

49 U.S.C. § 309:

Permits for Contract Carriers by Motor Vehicle.

"(a)(1) Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business. . . .

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 310 of this title, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In

determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

49 U.S.C. § 312:

Suspension, Change, Revocation and Transfer of Certificates, Permits, and Licenses.

"(b) Except as provided in section 5 [relating to combinations and consolidations of carriers] any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe. . . ."

V. California Public Utilities Code

§ 1005:

Issuance of certificate; terms and conditions.

"The commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the construction of a portion only of the contemplated street railroad line, plant, or system, or extension thereof, or for the partial exercise only of the right or privilege, and may attach to the exercise of the rights granted by the certificate such terms and conditions, including provisions for the acquisition by the public of the franchise or permit and all rights acquired thereunder and all works con-

structed or maintained by authority thereof, as in its judgment the public convenience and necessity require; provided, however, upon timely application for a hearing by any person entitled to be heard thereat, the commission, before issuing or refusing to issue the certificate, shall hold a hearing thereon."

§ 1063:

Certificate of convenience and necessity; Grandfather rights; transfer of franchise.

"No highway common carrier, cement carrier, or petroleum irregular route carrier, shall begin to operate any autotruck, or other self-propelled vehicle, for the transportation of property for compensation on any public highway in this state without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation. No such certificate shall be required of any highway common carrier as to the fixed termini between which or the route over which it was actually operating as a highway common carrier on July 26, 1917, and in good faith continuously thereafter, or for the performance of pickup, delivery, or transfer services by such carrier within such carrier's lawfully published pickup and delivery zones insofar as such pickup and delivery limits do not include territory in excess of three miles from the corporate limits of any city or three miles from the post office of any unincorporated point. The commission shall grant a certificate to operate as a cement carrier to any cement carrier as to the counties to and within which it was actually transporting cement as a cement carrier in good faith within one year prior to June 1, 1963, and continuously thereafter, provided such cement carrier applies to the commission for such certificate prior to

December 31, 1963, and submits adequate proof of such prior operations. The delivery of one or more loads of cement either in bulk or in packages to a point in a particular county shall constitute adequate proof of such prior operations and shall entitle applicant to authority to serve all points in said county from any and all points of origin. Any right, privilege, franchise, or permit held, owned or obtained by any highway common carrier, cement carrier, or petroleum irregular route carrier, may be sold, leased, transferred, or inherited as other property, only upon authorization by the commission."

§ 1731:

Application; grounds; grant; prerequisite to accrual of cause of action.

"After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has made, before the effective date of the order or decision, application to the commission for a rehearing."

§ 1731:

Application; grounds; grant; prerequisite to accrual of cause of action [as amended in 1965]

"After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed application to the commission for a rehearing before the effective date of the order or decision, or, if the commission fixes a date earlier than the 10th day after issuance as the effective date of the order or decision, unless the corporation or person has filed such application for rehearing before the 10th day after the date of issuance."

§ 1732:

Specification of grounds.

"The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application."

§ 1733:

Time for granting or denying application.

"Any application for a rehearing made 10 days or more before the effective date of the order as to

which a rehearing is sought, shall be either granted or denied before the effective date, or the order shall stand suspended until the application is granted or denied. Any application for a rehearing made within less than 10 days before the effective date of the order as to which a rehearing is sought, and not granted within 20 days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application."

§ 1734:

Hearing; time for determination.

"If any application for a rehearing is granted without a suspension of the order involved, the commission shall forthwith proceed to hear the matter with all dispatch and shall determine the matter within 20 days after final submission. If no determination is made within that time, it may be taken by any party to the rehearing that the order involved is affirmed."

§ 1735:

Stay.

"An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission by order directs."

§ 1736:

Order of abrogation, change, or modification; effect.

"If, after such rehearing and a consideration of all the facts, including those arising since the making

of the order or decision, the commission is of the opinion that the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change, or modify it. The order or decision abrogating, changing, or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission."

VI. Interstate Commerce Commission's General Rules of Practice

Rule 39 (49 C.F.R. § 1100.39):

Applications; notice.

"Appropriate notice of the filing of an application will be given by the applicant or by the Commission to the States, to State authorities, or to other persons as may be required by the form or instruction or by the act."

Rule 40 (49 C.F.R. § 1100.40):

Protests against applications.

"(a) *Content.* A protest against the granting of any application shall set forth specifically the grounds upon which it is made and contain a concise statement of the interest of protestant in the proceeding.

(b) *When filed.* Any protest shall be filed with the Commission promptly after the application is filed. If the proceeding be one respecting which the Commission has issued a notice advising the public of the filing of the application, the protest shall be filed within the time specified in such notice. Failure to file

a protest shall not prejudice subsequent participation in the proceeding.

(c) *Copies; service.* A protest filed under this section shall be served upon applicant and, unless otherwise specified in the public notice, the original and six copies of the protest shall be filed with the Commission.

(d) *When rule disregarded.* An application may be set for hearing without awaiting the filing of a protest or of a reply thereto, and also may be disposed of without regard to the prior paragraphs of this section unless the act provides that the particular application may be granted only upon hearing."

Rule 74 (49 C.F.R. § 1100.74):

Witness examination; order of procedure.

"Witnesses will be orally examined under oath before the officer unless their testimony is taken by deposition or the facts are presented to the Commission in the manner provided under modified or shortened procedure. In formal-complaint, application, and investigation proceedings complainant, applicant and respondent, respectively, shall open and close at the hearing, except at further hearings granted on petition the petitioner requesting further hearing shall open and close; and except, further, that parties other than the respondent shall open and close in investigations in which the burden of proof is not upon the respondent. Interveners shall follow the party in whose behalf the intervention is made. The foregoing order of presentation may be varied by the officer, who also shall designate the order of presentation in any other type of proceeding, of any other party to any proceeding, or of parties to several proceedings being heard upon a consolidated record."

Rule 76 (49 C.F.R. § 1100.76):

Evidence; cumulative restriction.

"It shall be the duty of the officer before whom any proceeding is being heard to limit the number of witnesses whose testimony may be merely cumulative. And in order to enforce this section, the officer may require a clear statement on the record of the nature of the testimony to be given by any witness proffered."

Rule 96 (49 C.F.R. § 1100.96):

Exceptions to officer's report.

"(a) *Generally.* Exceptions to the officer's report with respect to statements of fact or matters of law must be specific and must be stated and numbered separately. If exception is taken to conclusions in the report, the points relied upon to support the exception must be stated and numbered separately. When exception is taken to a statement of fact contained in the report, reference also must be made to the page or part of the record relied upon to support the exception and a corrected statement must be incorporated.

(b) *When filed.* Within 30 days after service of the officer's report, any party may file and serve exceptions thereto and reasons in support thereof. Replies may be served and filed as provided in Rule 23. In any case the Commission may, in its discretion, upon notice to the parties reduce or extend the time for filing exceptions or replies.

(c) *Exceptions and request for hearing by person not party.* If the proceeding is one in which no oral hearing has been held, any person not a party to the proceeding, but having an interest therein, may file and serve upon applicant, or complainant, as the

case may be, exceptions to the officer's report and reasons in support thereof. A request for hearing may be included therein but the exceptions need not include a request for hearing if none is deemed necessary."

Rule 101 (49 C.F.R. § 1100.101):

Petitions for rehearing, reargument, or reconsideration.

"(a) *In general.* (1) A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.

(2) *Administrative finality of division and employee board decisions.* All decisions, orders, or requirements of a division of the Commission in any proceeding shall be considered administratively final, except those involving issues of general transportation importance, those wherein the division reverses, changes, or modifies a prior decision by a hearing officer, and those wherein the initial decision is made by a division; *Provided, however,* That this subparagraph shall not preclude the seasonable filing of a petition for relief under paragraphs (b) and (c) of this section, to be considered and disposed of by the division or appellate division which made the decision, order, or requirement as to which relief is sought. Decisions of an employee board, whether original or on review, are not administratively final. Such employee board decisions shall be subject to review by an appropriate appellate division of the Commission upon the filing of a timely petition in accordance with these rules of practice.

(3) *Limitations on petitions for review of division decisions.* Pursuant to authority granted in section 17(6) of the Interstate Commerce Act, the right to apply to the entire Commission for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division of the Commission in any proceedings shall be limited and restricted to those proceedings in which the entire Commission, on its own motion, determines and announces that an issue of general transportation importance is involved. In proceedings in which no such announcement has been made, but in which a division reverses, changes, or modifies a prior decision by a hearing officer or where the initial decision is made by a division, a petition to the same division for rehearing, reargument, or reconsideration of its decision will be permitted and will be considered and disposed of by such division in an appellate capacity and with administrative finality.

(4) *Petitions seeking a finding that an issue of general transportation importance is involved; 3-page limitation; time for filing; no reply permitted.* In any proceeding which has involved the taking of evidence at oral hearing or by modified procedure in which the Commission has not noted the presence of an issue of general transportation importance, any party may, within 15 days after the service of a final decision, order, or requirement of a division or appellate division, as to which the filing of a petition for rehearing, reargument, or reconsideration is not permitted, file a petition requesting the Commission to find on its own motion that the proceeding is one involving an issue of general transportation importance. Any petition seeking such a finding shall not be considered an application for rehearing, reargument, or reconsider-

ation within the meaning of section 17 of the act and shall not exceed 3 pages. No reply thereto may be filed and the ruling thereon will be final. Petitions seeking the relief specifically covered herein will not be entertained at any other stage of the proceeding.

(5) *Copies of petitions and replies.* In cases in which it has been determined and announced that an issue of general transportation importance is involved, there shall be furnished for the use of the Commission the original and 14 copies of each petition filed under this section and of replies to such petitions. A like number of copies shall be furnished of petitions seeking a finding that the proceeding involves an issue of general transportation importance. In all other cases, the original and 7 copies of such petitions and replies shall be furnished for the use of the Commission.

(b) *Rehearing or further hearing.* When in a petition filed under this section opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

(c) *Modification of effective date.* A petition under this section seeking only modification of the effective date of a decision, order, or requirement, or in the period of notice, or other period or date prescribed therein, must be filed seasonably, except that, in case of unforeseen emergency satisfactorily shown by petitioner, such relief may be sought informally by telegram or otherwise, provided like notice is simultaneously communicated to all parties of record.

(d) *Reconsideration.* If relief under this section other than under paragraphs (b) and (c) is sought,

the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in Rule 96(a), as should also any substitute finding or other substitute requirement desired by petitioner.

(e) *Time for filing.* Except for good cause shown, and upon leave granted, petitions under this section must be filed within 30 days after the date of service of a decision or order, except as otherwise provided in the special rules of practice.

(f) *Successive petitions on same grounds, not entertained.* A successive petition under this section submitted by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission will not be entertained.

(g) *Petitions for reconsideration of appellate division decisions on review of board decisions.* When an appellate division has denied a petition seeking a reversal, change, or modification of a determination whether original or on review by a board of employees, any further petition for reconsideration by the same party or parties upon substantially the same grounds will not be entertained. If in the consideration of such a petition, however, by the appellate division, the previous determination of the board of employees has been reversed, changed, or modified, a further petition may be filed by any party to the proceeding adversely affected by the decision of the appellate division, within the time specified in paragraph (e) of this section, and the petition will be considered and disposed of by the same appellate division which passed upon the initial petition."

Rule 247 (49 C.F.R. § 1100.247) [Adopted in 1964, as amended in 1966]:

[Special Rules]

. . . .

"(d) *Protests and request for hearing.* (1) Protests to the granting of an application shall be filed with the Commission within 30 days after the date notice of the filing of the application is published in the FEDERAL REGISTER. A protest filed under these rules shall certify that it has been served upon applicant's representative (or applicant, if no practitioner representing him is named in the notice of filing published in the FEDERAL REGISTER). Unless otherwise specified in the published notice, the original and one copy of the protest shall be filed with the Commission. Protests not in reasonable compliance with the requirements of these rules may be rejected in the discretion of the Commission.

(2) Failure seasonably to file a protest will be construed as a waiver of opposition and participation in the proceeding.

(3) A protest against any application shall set forth specifically the grounds upon which it is made and contain a detailed statement of the protestant's interest in the proceeding (including a copy of the specific portions of its authority which protestant believes to be in conflict with that sought in the application, and describing in detail the method (whether by joinder, interline, or other means) by which protestant would use such authority to provide all or part of the service proposed), shall request an oral hearing if one is desired, and shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased gener-

ally. Protests phrased in general terms and not complying with these specifications may be rejected.

(4) Any request for an oral hearing shall be supported by a specific explanation as to why the evidence to be presented cannot reasonably be submitted in the form of affidavits, and shall set forth the number of witnesses which would be presented by the protestant and an estimate of the hearing time required for such presentation. Protests embracing a request for oral hearing shall contain the following certification without further qualification:

> The undersigned hereby certifies that, if an oral hearing is held, protestant(s) will appear and present evidence of protestant(s) own operations and particular interest(s) in the outcome of this application unless this application is amended so as to eliminate the interest(s) of protestant(s) as set forth in this protest.

(5) Where a person has a limited interest in an application, which possibly could be eliminated by a restrictive amendment to the application, which amendment must be acceptable to the Commission, it may also include in a protest filed in conformity with this paragraph an offer to withdraw the protest in the event of acceptance by applicant and the Commission of such amendment."

VII. California Public Utilities Commission's Rules of Practice and Procedure

Rule 21:

Common Carrier Certificates.

". . . [A]pplications for certificates . . . shall contain the following data . . . :

(f) The names of all common carriers with which the proposed service is likely to compete, and a certification that a copy of the application has been served upon or mailed to each such carrier named. Applications shall also name all other parties to whom copies of the application will be mailed. Applicants shall promptly notify the Commission of such mailing. Applicants shall also mail copies to such additional parties and within such times as may be designated by the Commission.

. . . ."

Rule 53:

Intervention.

"In a complaint proceeding petitions to intervene and become a party thereto shall be in writing, shall set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or opposition to the relief sought. Such a petition shall be served and filed by petitioner at least five days before the proceeding is called for hearing, except for good cause shown. If petitioner seeks a broadening of the issues and shows that they would not thereby be unduly broadened, the petition shall be served and filed by petitioner at least ten days and the parties may serve and file replies at least five days, before the matter is called for hearing.

Leave will not be granted except on averments which are reasonably pertinent to the issues already presented, but do not unduly broaden them. If leave is granted, the petitioner thereby becomes an intervener and a party to the proceeding to the degree indicated by the order allowing intervention, or by the presiding officer at the hearing."

Rule 54:

Participation Without Intervention.

"In an investigation or application proceeding, or in such a proceeding when heard on a consolidated record with a complaint proceeding, an appearance may be entered at the hearing without filing a pleading, if no affirmative relief is sought, if there is full disclosure of the persons or entities in whose behalf the appearance is to be entered, if the interest of such persons or entities in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed.

A person or entity in whose behalf an appearance is entered in this manner becomes a party to and may participate in the proceeding to the degree indicated by the presiding officer."

Rule 55:

Consolidation.

"Proceedings involving related questions of law or fact may be consolidated."

Rule 56:

Motion to Dismiss.

"A motion to dismiss (other than a motion based upon a lack of jurisdiction) any proceeding before this Commission, which is based upon the pleadings or any matter occurring before the first day of hearing may only be made upon five days' written notice thereof duly filed and served upon all parties to the proceeding and all other parties upon whom service of copies of the pleadings are therein shown to have been made."

Rule 57:

Order of Procedure.

"In hearings on complaints, applications and petitions, the complainant, applicant, or petitioner shall open and close.

In hearings on investigation proceedings where filed rates or rules which do not result in an increase have been suspended, the respondent shall open and close. In other investigation proceedings, the Commission's staff shall open and close. Interveners shall follow the parties in whose behalf the intervention is made. The presiding officer, where circumstances warrant, may vary the order of presentation."

Rule 62:

Designation.

"When evidence is to be taken in a proceeding before the Commission, one or more of the Commissioners, or an Examiner, may preside at the hearing."

Rule 63:

Authority.

"The presiding officer may set hearings and control the course thereof; administer oaths; issue subpoenas; receive evidence; hold appropriate conferences before or during hearings; rule upon all objections or motions which do not involve final determination of proceedings; receive offers of proof; hear argument; and fix the time for the filing of briefs. He may take such other action as may be necessary and appropriate to the discharge of his duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission."

Rule 75:

Briefs.

"The presiding officer may fix the time for the filing of briefs. Concurrent briefs are preferable. Exhibits may be reproduced in an appendix to a brief. A brief of more than twenty pages shall contain a subject index and table of authorities. Requests for extension of time to file briefs must be made to the Commission in writing, and a copy thereof served upon or mailed to the other parties to the proceeding. Ordinarily, when a matter has been submitted on concurrent briefs, extensions will not be granted unless a stipulation is filed with the Commission. The original of each brief shall contain a certification that copies have been served upon or mailed to each party or his attorney."

Rule 76:

Oral Argument.

"If the Commission or the presiding officer is of the opinion that the complexity or importance of the issues so warrant, the Commission or the presiding officer may direct or permit the presentation of oral argument."

VIII. Administrative Procedure Act (as codified prior to 1966 amendments)

5 U.S.C. §1008:

Hearings.

". . . .

"(b) Hearing powers—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and

receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

. . . . ."

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

70-92

No. ~~1419~~

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners,*

vs.

TRUCKING UNLIMITED, et al., *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1419

CALIFORNIA MOTOR TRANSPORT CO., et al.,
Petitioners,

vs.

TRUCKING UNLIMITED, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

Respondents accept petitioners' statement.

JURISDICTION

The district court had jurisdiction under 15 U.S.C. §§15 and 26. The jurisdiction of this court has been

invoked by petitioners under 28 U.S.C. §1254(1). An extension of time for filing this Brief in Opposition to and including May 1, 1971, was granted by the Court.

STATUTES INVOLVED

The following materials are involved in addition to those set forth in the Appendix D to the Petition: (1) the Interstate Commerce Act, (2) the Urgent Deficiencies Act, (3) the California Public Utilities Code, and (4) the Administrative Procedures Act. The relevant additional provisions, together with further portions of the rules of the Interstate Commerce Commission and the California Public Utilities Commission, are set forth in Appendix B hereto.

QUESTIONS PRESENTED

1. Is the concerted use of judicial and administrative adjudicative processes, as the method of implemeeting a scheme to restrain trade, as alleged in the First Amended Complaint, exempted from the Sherman Act by the *Noerr-Pennington* doctrine as a matter of law on a motion under FRCP, Rule 12(b)(6)?

2. Assuming the *Noerr-Pennington* rule extends to the use of judicial and administrative adjudicative processes in a scheme to restrain trade, is relief under the Sherman Act barred as a matter of law on a motion under FRCP, Rule 12(b)(6) where the real purpose and actual effect of defendants' joint activ-

ities was to restrain competitors directly by deterring the filing and prosecution of applications rather than to restrain competition indirectly through bona fide efforts to induce restrictive governmental action?

STATEMENT OF THE CASE

This matter is before the Court because the district court granted petitioners' 12(b)(6) FRCP motion to dismiss for failure to state a claim upon which relief could be granted. In the district court petitioners also filed a motion to dismiss asserting lack of jurisdiction and also claimed primacy or exclusivity of jurisdiction in the ICC and PUC. This motion was not argued or considered by Federal District Judge Sweigert as shown by his letter of October 25, 1967 (Appendix A). Therefore, all questions of exclusive jurisdiction, primary jurisdiction, exhaustion of administrative remedies, express exemption or implied immunity from antitrust laws have not been argued, briefed, or decided and are not now before this Court. It would seem that Circuit Judge Hamlin's dissenting opinion, as well as some of petitioners' points, is based in part upon such issues.[1] The sole question considered and

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[1]The Petition (pp. 7-8) attempts to bring into issue or into evidence matters outside the pleading and outside the scope of the 12(b)(6) FRCP motion to dismiss. Whether the agencies or courts were prevented from exercising control over petitioners is not the question here in issue. The only question before the court is the reach of the *Noerr-Pennington* doctrine to the activities set forth in the complaint and not whether the involved forums, having some potential to control, had exclusive jurisdiction, thus ex-

ruled upon by the two courts below is whether the *Noerr-Pennington* doctrine precludes the operation of the antitrust laws under facts alleged in the First Amended Complaint.

The complaint alleges that petitioners, 19 large highway carriers, and respondents, 15 highway carriers, were engaged in the business of transporting goods throughout California and the West. For some period of time prior to 1962, the California PUC had a liberal policy toward the granting of certificates and their transfer. It is alleged that petitioners, in order to combat the competitive effects of this policy, entered into an agreement in February 1961, to protest

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cluding Sherman Act operation. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

A host of other cases decided by the Court are clear in their holding that no industry, regardless of regulation, enjoys a blanket exemption from the antitrust laws. *U.S. v. Philadelphia National Bank*, 371 U.S. 296 (1963); *U.S. v. Pacific & A.R. & N. Co.*, 228 U.S. 87 (1913); *U.S. v. Radio Corporation of America*, 358 U.S. 344 (1959); *U.S. v. Borden Co.*, 308 U.S. 188 (1939); *U.S. v. Federal Power Commission*, 369 U.S. 482 (1959).

Petitioners' lawful standing to appear in such proceedings is not authorization to violate the antitrust laws nor does such standing exempt or immunize them from those laws. Furthermore, respondents are not required by the regulatory statutes involved or by the requirements of the Sherman Act to seek whatever relief might be available through agencies before filing a treble damage action. *Carnation Co. v. Pacific Westbound Conference, supra*, at 222. Nor do the restrictions of the Sherman Act to a common carrier depend upon whether false information is given. Sherman Act violations based upon concerted employment of adjudicatory processes or the "sham" exception to the *Noerr-Pennington* doctrine do not require false information as a predicate for liability. Lastly, whether the First Amended Complaint alleged that a feature of petitioners' agreement was that the alliance would be used against its own members should any one of them file an application is not relevant here. This evidence, alluded to in Footnote 6 of the Petition, has no significance to the charge of whether a conspiracy under the Sherman Act existed or whether the *Noerr-Pennington* rule protects the conspiracy alleged.

all applications then on file with the PUC and ICC, and to protest *all* subsequently filed applications. The practice persisted to the date of the filing of the complaint. Protests, if unsuccessful in causing a withdrawal or settlement, would be pursued to the last forum available. The act of filing protests included demands for hearings, thus necessitating the adversary proceedings under the applicable laws and rules. It was agreed that the financing of the described program should be achieved by a monthly contribution by all petitioners, regardless of the area of operation. The prime purpose of the conspiracy was to discourage and preclude the filing of applications or, once applications had been filed, to discourage and preclude their prosecution. As a necessary part of the plan and in order to give it validity, petitioners agreed to make concerted and competent efforts to prevail at each level. As a most important feature of the plan, petitioners agreed to and did in fact publicize, not to the public, shippers, the PUC, ICC or courts, but to other carriers, the fact of the formation and existence of the combination, the identity of the members, that the agreed contributors would finance protests against all existing and all future applications, regardless of merits, that should petitioners not prevail, all applicants, as a matter of certainty, would encounter all procedural rehearing and appeal devices legally available, and that expense and delay would result even if any applications were finally granted. Petitioners demonstrated to the industry that they were serious about their plan because they vigorously made good on it.

The complaint alleges that the plan was successful not because of any change of the liberal policy of the California PUC, because that policy did not change, but because of settlements or voluntary dismissals of filed applications or abstentions from filing at all due to petitioners' implemented plan. By thus employing adjudicatory processes of agencies and courts, defendants became the regulators, effectively foreclosed access and information to the PUC, ICC and courts. The successful achievement of petitioners' goals was reached not by action of the PUC, ICC or courts but by the success of the plan to deter and preclude filings and prosecution of applications. The holding of the Court of Appeals does not operate to deny lawful and constitutional access to any petitioner or combination of them to the adjudicatory functions of agencies or courts.

ARGUMENT

A. REASONS FOR DENYING WRIT.

Petitioners attempt to interest the court on four grounds, none of which, after analysis, is supportable, particularly at this stage of the proceedings. The Court should deny the writ because the Court of Appeals' decision is entirely consistent with *Noerr-Pennington,* there is no conflict among the circuits, there is no constitutional question either raised or invoked except as referred to in *Noerr* and, even assuming 300 expressions of interest in the decision, such interest by unidentified persons accompanied by an undisclosed number of trade associations contacted by petitioners who showed interest are not grounds for granting the writ. There is no showing that there

is any other group in existence formed for the purpose of and using the means alleged in the First Amended Complaint to restrain trade.

B. THE NINTH CIRCUIT DECISION IS ENTIRELY CONSISTENT WITH NOERR-PENNINGTON

1. Petitioners' activities alleged were not political in nature but were an unlawful conspiracy to restrain trade through employment of adjudicatory processes of agencies and courts. (Meeting petitioners' arguments A-1, A-2 and A-3, Petition, pp. 9-18.)

Eastern Railroads Presidents Conference v. Noerr, 365 U.S. 127 (1961) dealt only with lobbying approaches to the legislative and executive branches of government. *United Mine Workers v. Pennington,* 381 U.S. 657 (1965) dealt only with lobbying approaches to the Secretary of Labor and the T.V.A. purchasing agents. The court characterized these approaches as political activities. Petitioners have taken words used in *Noerr,* such as "political activity", "government", and "public officials" and, without any convincing arguments, urge that the *Noerr-Pennington* doctrine is applicable because the forums alleged to be employed in this case are part of government, that hearing officers, commissioners and judges are public officials, and that any contact with such governmental officials is necessarily political activity. Such a simplistic approach cannot convert behavior before adjudicatory bodies to true political activities as described in both *Noerr* and *Pennington.* Petitioners argue that because their activities employed the machinery of government, it necessarily follows

that such activities must be political. Following their fallacious premise, petitioners conclude that because such activities are allegedly political, they cannot be business activities and, thus, they are out of the reach of the Sherman Act.

In *Noerr,* on no less than eight occasions, the court made crystal clear the activities which it intended to protect.[2] It clearly articulated the basis for the "essential dissimilarity" as being the necessity in a representative government that people have the unfettered right to freely inform public officials. This right is not even brought into issue by the Court of Appeals opinion which is correctly based solely on the First Amended Complaint.

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[2]1. "We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon the *mere attempts to influence the passage or enforcement of laws.*" (365 U.S. at 135) (All emphasis added in this footnote.)

2. "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to *persuade the legislature or the executive to take particular action with respect to a law . . . .*" (365 U.S. at 136)

3. "And we do think the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that Sherman Act forbids associations *for the purpose of influencing the passage or enforcement of laws.*" (365 U.S. at 137)

4. "For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads *at least insofar* as those activities comprised mere solicitation of governmental action with respect to the *passage and enforcement of laws.*" (365 U.S. at 139)

5. "The right of the people to inform their representatives in Government of their desires *with respect to the passage or enforcement of laws* cannot properly be made to depend upon their intent in doing so." (365 U.S. at 138)

6. "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. More-

The governmental processes involved in this case did not involve the passage or enforcement of laws as contemplated by *Noerr*. The government function involved in the instant case was the application of legislatively established standards to individual cases in contested judicial proceedings. *Noerr-Pennington* does not protect cases of abuse or misuse of the judicial or adjudicative processes, whether the processes are those of the agencies or the courts.

The Public Utilities Commission and the Interstate Commerce Commission licensing procedures, as established by the legislatures and commissions, are adjudicative in nature. Because it is not the function of such adjudicative processes to pass or enforce laws which may or may not restrict competition, but only to apply laws and standards established by the legislature or by their own rule making activities, the necessity for unlimited access for any purpose, present in connection with representative branches of government, is not present there. In this case the normal lobbying opportunities were fully open to petitioners. No doubt such activities would have *Noerr-Pennington* protection.

However, petitioners did not choose this method to restrain trade. The Petition characterizes petitioners'

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over, *all of the evidence* in the record, *both oral and documentary*, deals with the railroads' efforts to *influence the passage and enforcement of laws.*" (365 U.S. at 142)

7. "No one denies that the railroads were making a genuine effort *to influence legislation and law enforcement practices.*" (365 U.S. at 144)

8. "That (Sherman) Act was not violated by either the railroads or the truckers in their respective campaigns *to influence legislation and law enforcement.*" (365 U.S. at 145) (Emphasis supplied.)

behavior as simply combining to present "commonly held positions before administrative bodies and courts" (Petition, pp. 10-11). It requires no more than a cursory reading of the complaint to ascertain that such behavior is not alleged nor is it at issue in this case.[3]

Petitioners' argument that litigation is not involved but only legislative acts is totally without merit. The point has been dealt with in the opinion of the Court of Appeals. (Petition, Appendix A, pp. 5-8, fn. 5-8.) The first leg of petitioners' argument that "public convenience and necessity" is a rule making function, essentially legislative is not helpful. Those words express no more than a legislatively derived standard under which carriers receive their licenses to do business. The means chosen by the lawmakers and commissions to apply that standard to individual cases is through adjudicative proceedings, both in the agencies and the courts.[4]

That the ICC and PUC function as courts as well as rule making agencies cannot be doubted. Whether such functions be denominated "quasi-legislative" or "quasi-judicial" is not the point. Such labels are

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[3]It appears that petitioners in seeking to interest this Court are striving to create the impression that joint protests in individual cases by carriers having common interests in such proceedings have been pleaded or somehow are at issue here. The legality of legitimate joint protests in individual cases is simply not in issue here. The complaint here attacks very specifically the program as described.

[4]While it is true, as petitioners point out, that the PUC has the power to issue certificates with or without hearing (Petition, Appendix D, p. 64), Public Utilities Code §1005 makes a hearing mandatory upon timely application of a person entitled to protest.

meaningless. The Supreme Court of California in *Pacific Telephone & Telegraph Co. v. Eshleman,* 166 Cal. 640, 648 (1913) very early in the history of the PUC ruled that the commission exercised "judicial functions" as well as "purely legislative or legislative-administrative functions." The PUC's judicial functions were held to be of a "highly judicial nature" vested in it by the California Constitution. The PUC is empowered by the Constitution to hear and determine causes "in the same manner and to the same extent as a court of record." The Supreme Court of California concluded on this point by saying:

> "It may be said that the final order of the commission in many instances is legislative-administrative in character, but nonetheless the *ordained procedure by which this result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon these controverted matters, are strictly judicial. (Robinson v. Sacramento, 16 Cal. 208; Imperial Water Co. v. Board of Supervisors, 162 Cal. 14 [120 Pac. 780]).*" (Emphasis added.) 166 Cal. at 648.

See Article XII, §§22 and 23 of the California Constitution.

The cases cited by petitioners (Petition, pp. 12-13) do no more than hold that commission determinations are subject to limited rather than a general court review. Respondents do not deny that it is the function of the agencies and courts when employing *ordained* adjudicatory processes to resolve private disputes to carry out legislative standards. Such is the

purpose of the use of the judicial function thus employed. The case at bar deals with petitioners' use of such procedures and not the correctness of the application of the standards. As set forth in *Eshleman,* procedural functions used by the PUC in contested proceedings, though resulting in the issuance of final orders based upon legislative-administrative criteria, are strictly judicial. This ruling has not been overturned and the subject matter is not even dealt with in cases cited by petitioners.[5]

Both the PUC and ICC have established procedures, meeting procedural due process requirements, which provide for a hearing in individual cases upon the filing of a verified application and a demand for a hearing by a protestant. (Cal. Public Utilities Code §1005, Rules of Practice (ICC) Rule 247 (49 C.F.R. §1100.247.) The procedures are judicial in nature. They provide for issuance of process, formal notices, discovery, depositions, subpoenas, testimony under oath, written findings and conclusions, written decisions and use of precedent in the decisional process, a formal record and the impermissibility of a contested case. Both regulatory schemes provide for judicial review under statutory criteria. (See Statutes and Rules set forth in Appendix B and Petition Appendix D, pp. 61-82, inclusive.)

Respondents know of no writers on the subject, including those cited by petitioners (Petition, pp.

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[5]*Southern California Edison Co. v. R. Comm.*, 6 Cal.2d 737 (1936), one of the cases cited by petitioners, holds in clear terms that the commission exercises legislative, executive, administrative and judicial power (pp. 737-738).

12-13) which hold a view that the agencies in question do not engage in judicial activities. Petitioners have cited the 1956 edition of Public Regulatory Law, Vantage Press, 1956, by Judge McKeage. At pages 84 and 85 of his publication, the author refers to the "internal adjudicatory process of an administrative tribunal" as being on a par with that of the average court. He points out that in such function the California PUC is "a court of record" by constitutional fiat. He points out that such administrative bodies have many functions, but among them is the "purely judicial function". Judge Friendly's article entitled "The Federal Administrative Agencies: A Need for Better Definition of Standards", 75 Harv. L. Rev. 863 (1962) also supports respondents' views. He asserts that since from a practical point of view the legislature is incapable of "administrative adjudication", it is improper to call such function a delegation by the legislature (p. 871). He stated:

> "It will scarcely have escaped your attention that the application of standards of greater or less generality to concrete cases is not a function peculiar to administrative agencies; it has long been practiced by other institutions not unknown to law students. Indeed, at one end of the administrative spectrum, *it is hard to discern much difference between either the problem or the decisional processes of the agencies and those of the courts.*" (75 Harv. L. Rev. at 874; emphasis added.)

See also 1 K. Davis, Administrative Law Treatise, §7.02 at p. 413 (1958).

Irrespective of labels, such as "political" or "business" activities, the courts have consistently held that use of adjudicatory machinery, pursuant to a conspiracy to unreasonably restrain trade, will result in a violation of the Sherman Act. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *U. S. v. Singer Manufacturing Co.*, 374 U.S. 174 (1963); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 424-425 (10th Cir. 1952), *cert. den.* 344 U.S. 837; *Lynch v. Magnavox Co.*, 94 F.2d 883 (9th Cir. 1938). The considerations of *Noerr-Pennington* are absent and such procedures may not be corrupted or perverted under the banner of political activity.

Perversion of adjudicatory processes of an agency is no less a violation of law than similar perversion of court functions. This proposition was established in *Singer* where defendants were found to have conspired to bring adversary proceedings before the U.S. Tariff Commission as well as before the courts. See also *Melvin v. Pence*, 130 F.2d 423 (D.C. Cir. 1942) and *National Surety Co. v. Page*, 58 F.2d 145 (4th Cir. 1932). *NAACP v. Button*, 371 U.S. 415 (1963) is of no help to petitioners since the basis of that decision was the otherwise lawful and ethical aim of the NAACP, thus making use of courts appropriate.[6]

[6]*Button's* facts are widely different from those alleged. The court there acknowledged that the NAACP had no other forum of government open to it to achieve its admittedly political purposes. No abuses of court functions for an unlawful purpose were present in *Button*. On the contrary, the purpose of litigation there was to redeem constitutional rights, a high and ethical aim.

In the case at hand, petitioners' purposes are assumed on this 12(b)(6) motion to be unreasonably anticompetitive and, but for the protection of *Noerr-Pennington,* are clearly illegal.

Neither the power of the executive and legislative branches nor the rule making powers of agencies to develop standards having anticompetitive effects is endangered by the opinion below. The Court of Appeals held that the function of government employed by petitioners alleged in the First Amended Complaint is not charged with the passing or enforcing of anticompetitive laws. Rather, in those procedural forums, they are charged with applying to individual contested cases then established standards of public convenience and necessity. (Petition, Appendix A, p. 5) The complaint does not allege and petitioners have failed to show that lobbying governmental bodies acting in rule making or law enforcement capacities was foreclosed to their combination, nor that they were precluded from supplying information to them. Nor have petitioners shown that the Ninth Circuit's opinion holding the alleged combination violative will preclude them from properly and lawfully furnishing information to the agencies acting as courts or to courts themselves. It is the conspiracy to pervert the processes of the courts, as alleged, for anticompetitive purposes, which is attacked in the complaint. Petitioners do not address themselves to this issue and thus their petition in very large part has little relationship to the narrowly drawn complaint.

Without conceding the point but assuming, as petitioners do (Petition, p. 14), that carriers are "encouraged" to file protests, it does not follow that the conspiracy here alleged is shielded from the Sherman Act by *Noerr-Pennington*. The invitation to participate in proceedings and the providing of machinery to do so is not a license to violate the law. Here, as elsewhere in petitioners' arguments, the points made ignore the First Amended Complaint and speak only of carriers' legitimate rights to protest in adjudicating forums. Petitioners should not be granted a review under *Noerr-Pennington* standards based on facts found only in their brief rather than those in the basic pleading.

Taken as a whole, petitioners' position is simply that their right to use court and judicial functions of agencies for any purpose is unlimited because of the First Amendment protection. Such a contention is utterly without merit. This branch of their argument contends that they have been denied lawful and constitutional access to government by the Ninth Circuit's opinion. Petitioners' claim must be taken to mean that the First Amendment of the United States Constitution guarantees to them not only the right to lobby the legislative and executive, but guarantees them a totally unrestricted right to use judicial processes for the purposes alleged in the First Amended Complaint.

NAACP v. Button, supra, at 440-441, a case relied upon by petitioners, held that litigation as a means of vindicating constitutional rights could not, *as a*

matter of law, be held to be malicious misuse of courts. The Court, continuing in *Button,* acknowledged that participation in "misuses of the legal process is conduct traditionally condemned as injurious to the public." It follows that petitioners may not balloon the lawful right to protest into a constitutionally protected license to use the processes of courts and adjudicatory bodies for the purpose and in the manner alleged. In *Button* the purpose was lawful and hence protected.[7] In *Noerr* the purpose, otherwise unlawful, was protected from the Sherman Act because the Sherman Act does not reach constitutionally protected political activities. In the case at bar, the unlawful purpose implemented by use of adjudicatory machinery is not protected by *Noerr* or the First Amendment.

The activities alleged are within the reach of the Sherman Act because they are abusive of processes of government, they are not political expressions, and the First Amendment does serve to immunize them. *Eastern Railroads Presidents Conference v. Noerr, supra; U.S. v. Singer Manufacturing Co., supra; NAACP v. Button, supra.*

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[7]In *Button,* Mr. Justice Harlan dissenting, acknowledged the laudable aims of the NAACP litigation but dissented on the ground that those aims may have been achieved by other means within the framework of existing state law. It is clear in the case at bar that other lawful methods were available to petitioners than the alleged plan. The Supreme Court has held recently on two occasions that courts are a proper forum for group activity where the aims of the group are lawful. *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar,* 377 U.S. 1 (1964) and *United Mine Workers v. Illinois State Bar Ass'n,* 389 U.S. 217 (1967).

Access to any branch of government is not unlimited. Even where lobbying is appropriate, registration of lobbyists is required and bribery is prohibited. In the recent case of *Woods Exploration & Prod. Co., Inc. v. Aluminum Co. of America,* 1971 CCH Trade Cases ¶73,422 (5th Cir. 1971), the court held that misrepresentations made to a rule making body were not *Noerr* protected because the "policies of the Sherman Act should not be sacrificed simply because defendants employ governmental processes to accomplish anticompetitive purposes." (p. 89,723) Access to adjudicating bodies is far more limited than to executive, legislative, and rule making bodies. Lobbying or extrajudicial attempts to influence the result of contested proceedings is prohibited. General Rules of Practice (ICC), Appendix A and Appendix C (49 C.F.R., Appendix A and Appendix C.) The mode of expression in forums employing adjudicatory processes is different from those found in other forums of government. The means of supplying information in judicial bodies is governed by formal rules with notice playing an important roll.

The processes of such forums may not be deliberately activated or interfered with in order to achieve an anticompetitive result. They may not be used to vent one's malice upon another. Thus, the intent and purpose of a party in using legal processes may be ascertained in order to determine if they have been misused for an unlawful purpose. Indeed, respondents know of no case which has held that judicial processes may be lawfully used to accomplish an unlawful

objective—whether the objective is wrapped up in political considerations or not. *NAACP v. Button, supra,* at 440-441. In *Button* the Court significantly pointed out behavior which would not be tolerated because it was a "different matter" than seeking to vindicate constitutional rights:

> "Resort to the courts to seek vindication of constitutional rights is a *different matter* from the oppressive, malicious, or avaricious use of the legal process for purely private gain." (371 U.S. at 443)

No matter how vociferously petitioners may argue the legitimacy of their activities in using the relevant forums, the First Amended Complaint charges them with oppressive, malicious and avaricious use of legal processes for purely private gain. This activity is, we submit, a "different matter" and "essentially dissimilar" from any protected activities found either in *Button* or *Noerr.*

Petitioners make no attempt to distinguish *Singer* and other similar cases, except to point out that *Noerr* was not mentioned in the *Singer* opinion. (Petition, p. 10) The reason for this omission is clear. *Noerr* was inapposite. The activities in *Singer* were nonpolitical in the *Noerr* sense, they were unlawful in purpose and they employed adjudicating machinery as a means. If petitioners are asserting that their participation in contested proceedings involving public convenience and necessity are political expressions and that patent litigation is not, then they are plainly wrong. The Constitution, laws and court decisions

have identified the patent area as one based upon a strong public policy and the patent office and the courts have exercised broad discretion within that area. The same is true of certificates of public convenience and necessity. The same may be said of antitrust policy. All are stamped with historic and broad public policy considerations. These factors, however, do not change the essential fact that in the context of adjudication of individual rights under such standards, they involve private disputes in judicial forums. Mere involvement of public policy considerations or discretion in the application of standards does not render participation in such disputes political expression.

A program to harass competition by filing consistent antitrust actions, patent infringement actions or protests in certificate proceedings, as alleged, is unlawful in purpose and is not protected by the Constitution, *Noerr* or *Button*.

2. Assuming the Noerr-Pennington rule applies to the concerted use of adjudicatory processes for the purpose of unreasonably restraining trade, petitioners' activities were not genuine efforts to influence government to restrain trade but were efforts to directly restrain the trade of competitors. (Meeting petitioners' argument A-4, pp. 18-28.)

Even if the court should find the *Noerr-Pennington* rule applicable to anticompetitive use of the adjudicatory functions here involved, the exception to that rule that activity ostensibly directed at influencing government action which, in substance, operates as a direct restraint upon competition is not protected, is applicable in this case. Respondents, under the pleadings

in this case, are clearly entitled to a trial on the "sham" issue. Evidence of the nature and purpose of the plan, correspondence and conversations should be considered by a trier of fact to determine if petitioners' aim was to make access to the agencies difficult or impossible or whether the method decided upon to restrain trade was to induce government to act or refrain from acting. If the "sham" exception exists, as we submit it does, then the case should not have been dismissed without a trial.

Petitioners' concept of the "sham" rule is contrived and incorrect. They quote *Noerr* out of context and contrary to its clear meaning. We agree with petitioners up to this point, that if *Noerr* applies, anti-competitive intent is irrelevant. But we disagree with petitioners if they intend to call upon *Noerr's* protection for activities other than those which are "*genuine efforts* to influence" government to act or not act. The requirements of *Noerr* are simple. The anti-competitive aims must be sought to be achieved through genuine efforts to induce government to act in such a manner that it, not the petitioners, will restrain the trade of competitors. *Noerr* cannot apply unless that genuine effort is present.

There can be no doubt, as the Court found in both *Noerr* and *Pennington,* that the defendants there truly and ruthlessly sought to have the restraint achieved through government action. Their efforts, whether successful or not, were protected. Furthermore, resulting government actions were protected under the rule of *Parker v. Brown,* 317 U.S. 341 (1943).

Respondents' pleading here alleges that the petitioners' real purpose was to block accesses to agencies and to discourage the filing and prosecution of applications. The medium of government action was employed by petitioners, mainly to demonstrate to potential applicants that they were prepared to do and would do exactly what they publicly threatened. Thus, when petitioners appeared in protest, they vigorously asserted their opposition. However, the basic purpose, as alleged, underlies their entire scheme. The First Amended Complaint does not allege petitioners' success as resulting from actions of the agencies or courts. On the contrary, success was derived by reductions in the number of applications filed and increases in settlements and abandonments. Such reductions and increases did not result from agency or court rulings, for indeed the liberal policy remained, but because of the advertised burdens which necessarily had to be faced as a result of petitioners' declared and implemented purposes.

Favorable rulings were at times indeed received by petitioners' group, but such rulings were incidental to the principal purpose. *Noerr* itself recognized that incidental unlawful effects of a plan of political action would not preclude the application of the principle of that case. It follows that the obtaining of favorable rulings where an applicant did not abandon or settle, were inherent in the execution of the plan. However, they were incidental to it and should not serve to preclude the operation of the Sherman Act if the allegations of the First Amended

Complaint are proved at trial. *Eastern Railroads Presidents Conference v. Noerr, supra,* at 143-144, Petition, Appendix A, pp. 13-14.

The types of direct behavior which might constitute sham activities are as endless as the ability of businessmen to develop new and different methods to restrain competitors. The Sherman Act is one of general application and must be accorded flexibility, otherwise it would most certainly be circumvented. *Northern Pacific Ry. Co. v. U. S.,* 356 U.S. 1, 4 (1958); *U. S. v. American Tobacco Co.,* 328 U.S. 781, 809 (1946). The rule announced by *Noerr* dealing with sham activity is surely not limited to behavior which interferes directly with the "business relationships" of competitors or to the persuasion of customers "not to deal with truckers". Still petitioners argue that language in *Noerr* leads to the conclusion that only those limited classes of activities among all other possible types of activities by which the affairs of a competitor might be unlawfully interfered with may be characterized as "sham". Respondents submit that the Court in *Noerr* meant no such limitation on the sham exception. Customer relations were discussed there because the third party technique under discussion might well have been directed at customers. In the case at hand, petitioners were not attempting to interpose themselves directly between competitors or competitors' customers but, through concerted behavior, between competitors and lawful access to the agencies, the only source of competitors' business rights.

A recent Court of Appeals decision held *Noerr* inapplicable though it is clear from the facts that defendants did not interfere with business relationships of competitors or relationships with their competitors' customers. In *Woods Exploration and Prod. Co., Inc. v. Aluminum Co. of America, supra,* the court held that false information intended to influence the actions of the Texas Railroad Commission was not protected by *Noerr* (pp. 89,723-89,725). The Fifth Circuit found that defendants' conduct was "not designed to influence policy". Rather it held:

> "In light of this determination we hold that the *abuse* of the administrative process here alleged does not justify antitrust immunity. Consequently, we reverse the grant of summary judgment and remand the issue for an evidentiary determination of whether or not defendants in fact filed false nominations, and, if so, what damages plaintiffs sustained therefrom." (p. 89,725)

In connection with "sham", as before, petitioners have avoided dealing with the First Amended Complaint. Rather petitioners make an irrelevant and emotional plea that the Court of Appeals opinion in the instant case will prevent joint appearances before administrative and judicial bodies where the purpose is to influence policy. This case has not and cannot result in such a holding if respondents try to win the case on their First Amended Complaint. A trier of fact could conclude, if evidence proves the allegations, that petitioners had the specific purpose of deterring filings and making difficult free access by

the announcement and earnest carrying out of the plan. It will be argued at trial that petitioners could not have intended to achieve their restraint through government action because such an aim is totally inconsistent with the unique feature of the plan that there be a publicity campaign intended to convey in unmistakable terms to all competitors the prohibitive expenses of making applications. The publicity campaign was particularly devastating. It brought the filing of applications for rights, transfers and registrations from a high level to a virtual standstill. This happened despite the encouragement to file applications because of the liberal policy. In short, petitioners' activities demonstrated that their conspiracy was designed to prevent appellants from obtaining business rights not by defeating competitors on the merits before the commissions, but by directly deterring them from seeking such rights.

The Ninth Circuit's decision does nothing more than rule respondents are entitled to a trial on the "sham" issue. Petitioners' position amounts to nothing more than a plea that there really is no exception to *Noerr* so long as government processes are in any manner involved. *Noerr* renders no such protection. A conspiracy which has as its deliberate purpose the abridgment of open access to public bodies by others rather than a genuine effort to influence government cannot be immunized by the *Noerr-Pennington* doctrine.

C. THERE IS NO CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT. (MEETING PETITIONERS' ARGUMENT B, pp. 22-24.)

Petitioners cite *Associations of Western Railways v. Riss & Co.*, 299 F.2d 133 (D.C. Cir. 1962) as a circuit court opinion in conflict with the Ninth Circuit's. This position is no more or less than petitioners' prior argument that the Ninth Circuit opinion conflicts with *Noerr*. A reading of *Riss* showed that it is a carbon copy of *Noerr*. Many of the defendants in *Riss* were defendants in *Noerr*. The district court opinion[8] reveals that defendants directly or through public relation experts "persuade[d]" the Ohio PUC to file proceedings before the ICC (170 F.Supp. at 357); state, city and town officials were "urged" to enact statutes, ordinances and regulations designed to restrain Riss (170 F.Supp. at 357); and directly or through front organizations "urged" state officials to carry out a program of strict enforcement of existing laws and to investigate Riss (170 F.Supp. at 358). Finally, defendants "persuade[d]" citizen groups to register complaints against Riss before the ICC in rights proceedings. (170 F.Supp. at 358.) Petitioners have fixed upon the last allegation to establish their alleged conflict of decisions argument. The last point is not discussed either in the district court or court of appeals opinion. However, even assuming, as petitioners do, that it involved "evidently the presentation of evidence adverse to Riss in formal proceedings for certificates of public convenience and necessity"

[8] *Riss & Co. v. Association of American Railroads*, 170 F.Supp. 354 (D.C. D.C. 1959).

(Petition, p. 23), such activity does not create a conflict either with the decision in this case or with *Noerr*.

It is clear as to all of the alleged activities of defendants in *Riss* that the sole purpose of the conspiracy was a genuine attempt to have government act to restrain Riss, whether by executive orders, legislative action or rulings of the Commission. Indeed in *Riss*, as in *Noerr*, the anticompetitive impact was to be accomplished solely by government action. This was the reason for the existence of the conspiracy and the actions taken pursuant to it. There is no hint that the plan was one which sought directly to discourage and deter approaches to government by *Riss* by advertised threats of ceaseless protests. Although the words "abused their privilege of intervention" are used by the district court to describe the charges made by plaintiffs in characterizing defendants' acts in persuading citizen groups to intervene (170 F.Supp. at 358), no further elaboration of the point is made anywhere and the significance of the point is lost among those which were genuine lobbying activities. The court of appeals does not touch upon the point. Although it may have been alleged in *Riss* that defendants among other things persuaded citizen groups in one proceeding to abuse intervention privileges, it cannot be said that defendants' plan was one to abuse judicial process. A trial was had and it cannot be ascertained from the two decisions what disposition was made of the "abuse" point. The facts, as they appear from the decisions,

show no more than that the groups appeared and protested in a single proceeding at defendants' urging. The label "abuse", a conclusory allegation, must be taken to mean what follows it by way of description of the acts involved. Those acts were no more than registering of complaints to win a proceeding, not to give credence to a plan which advertised it would continually employ the processes of the agencies to deter future filing.

D. THE FIRST AMENDED COMPLAINT DOES NOT PRESENT ANY UNSETTLED QUESTIONS RELATING TO THE REACH OF THE SHERMAN ACT IN LIGHT OF THE FIRST AMENDMENT. (MEETING PETITIONERS' ARGUMENT C, pp. 24-25.)

This point is dealt with in the main by respondents' arguments that the rule of *Noerr-Pennington* does not apply here because (1) adjudicatory functions are involved and hence different considerations than those present in *Noerr* are applicable and (2) *Noerr* applies only where the actors genuinely attempt to persuade government to carry out their anticompetitive work. The constitutional necessity of freedom to inform government will not be endangered if respondents prove their allegations and receive a judgment.

Representative government must be freely available to all. But access to courts and adjudicatory bodies is limited and constitutionally so by prevention of abuses of its processes. *In Re Stolen*, 196 Wis. 602, 216 N.W. 127, 129 (1926); *Thomas v. Collins*, 323 U.S. 516, 531 (1945). Like the guaranteed right to

free speech, citizens' right to access to adjudicatory processes must be guarded against unseemly efforts to pervert the system from which the right arises. *Pennecamp v. Florida,* 328 U.S. 331, 347 (1946); *Bridges v. California,* 314 U.S. 252, 271 (1941); *Sheppard v. Maxwell,* 384 U.S. 333, 350-351 (1966): Under the allegations here relevant, petitioners combined and by their deliberate acts impinged directly upon competitors purposefully to deny them the access to government bodies which they now claim so vociferously for themselves. They clearly sought to stop the flow of information, claimed to be so important, originating from competing sources by clogging the channels of communicating that inforation. Respondents submit that plans such as petitioners' can and must never be given constitutional or any other protection. The plan under examination here is no more than the bypassing of government for a totally illegitimate purpose and it destroys the effectiveness of the processes and purposes of government.

If the constitutional right to petition is here involved, it does not protect the actor if such rights are abused by him. *Button* and *Noerr* both so hold. In neither of those cases was "abuse" of the processes of government found present. Thus, since the complaint here alleges that petitioners have abused the processes of government and thus have exceeded the allowable limits of constitutional protection, they must accept the consequences applicable to all who are not entitled to such protection. The consequences are that prevailing law controls them.

Petitioners suggest that a doctrine akin to primary jurisdiction be developed to correct abuses of the right to petition rather than permit remedies under existing law. This suggestion is totally without merit. Indeed, if the legislatures had intended such abuses to be handled exclusively in the agencies, they would have so provided. Certainly since the origination of our system of laws, abuses of the right of access to or use of the processes of government have been remedied in courts (e.g., private actions for abuse of process, malicious prosecution, use of patent litigation to restrain trade, etc.). Courts have the inherent power to protect themselves (e.g., contempt) and legislatures have the power to designate or withhold remedies, within constitutional limits, for all such unprotected activities. The legislature has not placed the exclusive remedies for unprotected abuses with the agencies here involved.

By statutory construction, untouched by the legislature, the Court has evolved "jurisdictional" rules for those seeking remedies against regulated violators of the Sherman Act. As stated previously, petitioners have presented both the "primary jurisdiction" and "exhaustion of remedies" defenses in the district court, but such contentions have not been ruled upon. They are not now in issue. Even if they were in issue, it is clear that the agencies involved here cannot award money damages for past acts even though they may have the power to remedy abuses prospectively. Furthermore, competitors, having been injured by an antitrust violation, may chose the forum in

which they seek relief unless exclusive jurisdiction prevents it. Such is not the case here. *Carnation Co. v. Pacific Westbound Conference, supra,* p. 222.

E. THIS CASE IS NOT OF GREAT IMPORTANCE TO A SUBSTANTIAL SEGMENT OF AMERICAN SOCIETY. (MEETING PETITIONERS' ARGUMENT D, p. 26.)

This case's notoriety, whatever its extent, arises only because writers, like petitioners, have not acknowledged the content of the First Amended Complaint. Finding it more palatable to argue from a different base, they have proceeded to call attention to points which are not raised and which are specifically excluded by a narrowly drawn pleading.

There is no showing that any other group similar to petitioners and having its purposes as alleged, exists anywhere in the United States. Respondents certainly know of none and petitioners have failed to mention any. The expression of interest of 300 unidentified persons is meaningless to sustain this ground for review. Petitioners do not describe who they are nor the details of their interest. The result of petitioners' canvas of trade associations does not reveal their number or what their interest may be. Respondents submit that there is no conflict between *Noerr-Pennington* and the instant case. They are widely separated factually and legally and do not create any inconsistency except insofar as petitioners depart from the alleged facts.

CONCLUSION

The only question before the Court is whether the facts alleged fall within the *Noerr-Pennington* construction of the Sherman Act. Primary jurisdiction and other similar problems are not in issue here. Respondents should be allowed to try this case on both the "adjudicatory process" theory and on the "sham" theory; however, proof under either theory is enough to render *Noerr* inapplicable. For reasons stated, the writ of certiorari sought by petitioners should be denied.

Respectfully submitted,

MICHAEL N. KHOURIE,
Counsel for Respondents.

BROAD, KHOURIE & SCHULZ,
MICHAEL N. KHOURIE,
Of Counsel for Respondents.

Dated, April 23, 1971.

(Appendices Follow)

Appendix A

Chambers of
William T. Sweigert
United States District Judge

San Francisco 1, California

October 25, 1967

Mr. Michael N. Khourie
Attorney at Law
Russ Building
235 Montgomery Street
San Francisco, California

Re: Trucking Unlimited, et al. v. California Motor Transport Co., et al., No. 45073

Dear Mr. Khourie:

On October 5, 1967, this Court issued its Memorandum of Decision in Civil No. 45073, dismissing the first amended complaint on the ground that, under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the first amended complaint failed to "state a claim upon which relief can be granted" pursuant to Fed. R. Civ. P. 12(b)(6).

Although that Memorandum deals exclusively with the applicability of the *Noerr* doctrine, it appears that there is some uncertainty with respect to whether the Court passed upon defendants' second motion to "Dismiss First Amended Complaint on Ground of Primary Jurisdiction, or to Stay Pending Administrative Action."

On page 2 of defendants' Memorandum of Points and Authorities in support of their motions, filed April 17, 1967, the defendants requested:

> "That the Motion to Dismiss for Failure to State a Cause of Action be considered First and Separately from the motions based on primary jurisdiction, and that the argument on the latter be withheld until decision on the former, so that if the Court agrees with defendants' position argument on the second motion will become unnecessary."

The Court also notes that defendants' motion to dismiss under the *Noerr* doctrine was the only motion argued during the oral presentation of this matter.

Lest there be any misunderstanding, I think it obvious that the separately made motion to dismiss on ground of primary jurisdiction *or* to stay pending administrative review was *not* considered in the October 6, 1967 Memorandum of Decision.

Sincerely,

/s/ W. T. S.

W. T. Sweigert

cc:

Graham James & Rolph

Heller, Ehrman, White & McAuliffe

John MacDonald Smith, Esq.

W. D. Benson, Jr., Esq.

Filed November 1, 1967,
James P. Welsh, Clerk.

Appendix B

Relevant provisions from the Interstate Commerce Act, Urgent Deficiencies Act, Administrative Procedures Act, General Rules of Practice (I.C.C.), California Constitution, California Public Utilities Code, Rules of Practice and Procedure (California P.U.C.)

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1. INTERSTATE COMMERCE ACT

49 USC § 17. Commission procedure; delegation of duties; rehearings

Conduct of proceedings; seal; oaths; quorum; rules

(3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpoenas. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested. All

hearings before the Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest.

Findings, etc., of Commissioner or board; accompanying statement and recommended order; copies to parties; exceptions; recommended order as Commission's order

(5) Any finding, report, or requirement of an individual Commissioner or board, with respect to any matter so assigned or referred involving the taking of testimony at a public hearing, shall be accompanied by a statement in writing of the reasons therefore, together with a recommended order, which shall be filed with the Commission. Copies thereof shall be served upon interested parties (including, in proceedings under Chapter 8 of this title, persons specified in section 305(e) of this title), who may file exceptions thereto, but if within twenty days after service upon such persons, or within such further period as the Commission or a duly designated division thereof may authorize, no exceptions shall have been filed, such recommended order shall become the order of the Commission and become effective unless within such period the order shall have been stayed or postponed by the Commission or by a duly designated division thereof. The Commission, or a duly designated division thereof, upon its own motion may, and where exceptions are filed it shall, reconsider the matter either upon the same record or after further hearing, and such recommended order shall thereupon be stayed or postponed pending final determination thereof.

Rehearing, reargument, or reconsideration of decisions, orders, and requirements

(6) After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5) of this section, any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, re-

argument, or reconsideration of a matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2) of this section, if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5) of this section, and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

Reversal or modification after rehearing, etc.

(7) If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order or requirement made after rehearing, reargument, or reconsideration, reversing, changing or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order.

Stay of decisions, etc., not effective at time of application for rehearing, etc.

(8) Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board

is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission.

Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.

(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Reference of administrative matters to examiners

(10) Any matter arising in the administration of chapter 8 of this title as to which a hearing is to be

held may be referred to an examiner of the Commission, for action thereon, subject to the conditions and limitations provided in this section in the case of reference of work, business or functions, as to which a hearing is to be held, to an individual Commissioner or board.

Intervention of representatives of employees

(11) Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees.

Admission to practice before Commission

(12) The Commission is authorized to promulgate reasonable rules and regulations relating to admission to practice before it, and is authorized to impose a reasonable fee for such admission, and such fees shall be covered into the Treasury of the United States as miscellaneous receipts.

49 USC § 305. Administration—Joint boards; composition; references of matters to boards

(a) The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this chapter with respect to such operations as to which a hearing is required or in the judgment

of the Commission is desirable: Applications for certificates, permits or licenses; the suspension, change, or revocation of such certificates, permits, or licenses; applications for the approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts; . . .

Oaths; attendance of witnesses and production of documents

(d) So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter.

Notice of proceedings and opportunity for hearing

(e) In accordance with rules prescribed by the Commission, reasonable notice shall be afforded, in connection with any proceeding under this chapter, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor carrier operations involved in the proceeding

are or are proposed to be conducted, and opportunity for intervention in any such proceeding for the purpose of making representations to the Commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties.

Court review of Commission's orders; compelling Commission to take jurisdiction

(g) Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title: *Provided,* That where the Commission, in respect of any matter arising under this chapter, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

Application of section 17 of this title

(h) All the provisions of section 17 of this title shall apply to all proceedings under this chapter.

Pecuniary interest in motor carrier under investigation forbidden

(i) No member or examiner of the Commission or member of a joint board shall hold any official relation to, or own any securities of, or be in any manner pecuniarily interested in, any motor carrier or in any carrier by railroad, water, or other form of transportation.

49 USC § 306. Certificate of convenience and necessity—Necessity for; carriers in bona fide operation on June 1, 1935; traffic moving to and from Territories and possessions; "grandfather" provisions

(a) (1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however, . . .*

Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful.

(6) In accordance with such reasonable rules as may be prescribed by the Commission, any party in interest, who or which opposed in the State commission proceeding the authorization of operations in interstate or foreign commerce, may petition the Commission for reconsideration of the decision of the State commission authorizing operations in interstate or foreign commerce, and upon such reconsideration upon the record made before the State commission, the Commission may affirm, reverse, or modify the decision of the State commission, but only with respect to the authorization of operations in interstate and foreign commerce.

(7) (A) In the case of any person who or which on October 15, 1962, was in operation solely within a single State as a common carrier by motor vehicle in intrastate commerce (excluding persons controlled by, controlling, or under a common control with, a carrier engaged in operations outside such State), and who or which was also lawfully engaged in such operations in interstate or foreign commerce under the certificate exemption provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before October 15, 1962, or who or which would have been so lawfully engaged in such operations but for the pendency of litigation to determine the validity of such person's intrastate operations to the extent such litigation is resolved in favor of such person, and has continued to so operate since October 15, 1962 (or if engaged in furnishing seasonal service only, was lawfully engaged in such operations in the year 1961 during the season ordinarily covered by its operations, and such operations have not been discontinued), except in either instance as to interruptions of service over which such person had no control, the Commission shall issue to such person a certificate of registration authorizing the continuance of such transportation in interstate and foreign commerce if application and proof of operations are submitted as provided in this subsection. . . Certificates of registration shall be valid only so long as the holder is a carrier engaged in operation solely within a single State, not controlled by, controlling, or under a common control with a carrier engaged in operation outside such State, and except as provided in section 5 of this title and in the conditions and limitations stated

herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission, but may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign rights shall terminate the right to engage in interstate or foreign commerce.

Application for certificate; form and contents

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of subsection (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle on October 1, 1935 may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

49 USC § 307. Issuance of certificate—Issuance authorized to qualified applicants for regular routes and between fixed termini

Certificate not to confer proprietary or property rights in highway

(b) No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways.

49 USC § 309. Contract carriers by motor vehicle

(a) (1) Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided, . . .*

Otherwise the application for such permit shall be decided in accordance with the procedure provided for in subsection (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful.

49 USC § 312. Suspension, change, revocation and transfer of certificates, permits, and licenses

(b) Except as provided in section 5 of this title, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

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2. URGENT DEFICIENCIES ACT

28 USC § 2321. Procedure generally; process

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 USC § 2322. United States as party

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 USC § 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection

of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 USC § 2324. Stay of Commission's order

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

28 USC § 2325. Injunction; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

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3. ADMINISTRATIVE PROCEDURES ACT

5 USC § 551. Definitions

For the purpose of this subchapter—

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

5 USC § 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before board or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial

manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for

the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 USC § 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 USC § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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4. INTERSTATE COMMERCE COMMISSIONS GENERAL RULES OF PRACTICE (49 CFR § 1100)

Rule 4. Communications and pleadings generally—

(e) Ex parte communications prohibited; penalties provided. Ex parte communications as defined in Appendix C to this part are prohibited and any person violating the prohibitions set out in such Appendix is subject to the penalties as therein provided.

Rule 19. Pleadings part of record. Recitals of material and relevant facts in a pleading filed prior to oral hearing in any proceeding, unless specifically denied in a counterpleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a competent witness must be made available for cross-examination on the evidence so included in the record. Pleadings may contain specific references to or quotation from the tariffs or schedules containing the several rates, fares, charges, schedules, classifications, regulations or practices alleged to be material. A filing under Rule 42 *Petitions for suspension of tariffs or schedules,* shall not be considered a pleading for purposes of this rule.

Rule 38. Applications—(a) Forms and instructions. An application filed with the Commission shall be

prepared in accord with and contain the information called for in the form of application, if any, described by the Commission, or any instructions which may have been issued by the Commission with respect to the filing of an application.

(b) Copies; service. Copies of an application shall be furnished in such number, and be filed and served in the manner and upon the persons specified in the form or instruction.

Rule 55. Notice of hearing

(a) Assignment; service and posting of notice; electronically recorded transcript. In those proceedings in which a hearing is to be held, the Commission will, by order or otherwise, assign a time and place for hearing. Such action will include notice when the transcript is to be made by electronic recording. Notice of such hearing will be posted in the Office of the Secretary of the Commission and will be served upon the parties and such other persons as may be entitled to receive notice under the Act.

Rule 56. Subpoenas—(a) Requests; particularity. Unless directed by the Commission upon its own motion, a subpena to compel a witness to produce documentary evidence will be issued only upon petition showing general relevance and reasonable scope of the evidence sought, which petition must also specify with particularity the books, papers, or documents desired, and the facts expected to be proved thereby: *Provided, however,* That for good cause shown, in lieu of a petition, the request for such a subpena may be made orally upon the record to the officer presiding

at the hearing. A request for issuance of a subpena other than to compel the production of documentary evidence may be made either by letter (original only need be filed with the Commission) or orally upon the record to the officer presiding at the hearing. A showing of general relevance and reasonable scope of the evidence sought may be required and the subpena will be issued or denied accordingly.

(b) Issuance. A subpena may be issued by the Commission or by the officer presiding at the hearing, but only under the signature of the Secretary or of a member of the Commission.

(c) Service. The original subpena shall be exhibited to the person served, shall be read to him if he is unable to read, and a copy thereof shall be delivered to him by the officer or person making service.

(d) Return. If service of subpena is made by a United States marshall or his deputy, such service shall be evidenced by his return thereon. If made by any other person, such person shall make affidavit thereof, stating the date, time, and manner of service; and return such affidavit on, or with, the original subpena in accordance with the form thereon. In case of failure to make service the reasons for the failure shall be stated on the original subpena. The written acceptance of service of a subpena by the person named therein shall be sufficient without other evidence of return. The original subpena, bearing or accompanied by the required return, affidavit, statement, or acceptance of service, shall be returned forthwith to the Secretary of the Commission, or, if so

directed on the subpena, to the officer presiding at the hearing at which the person subpenaed is required to appear.

(e) Witness fees. A witness who is summoned and responds thereto is entitled to the same fee as is paid for like service in the courts of the United States. Such fee is to be paid by the party at whose instance the testimony is taken at the time the subpena is served, except that when the subpena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered at the time of service.

Rule 57. Depositions; preliminary—(a) When permissible. The Commission will either upon its own initiative, or for good cause shown by a party to a proceeding, issue an order to take a deposition.

(b) Officer before whom taken. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Within a foreign country a deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission.

(c) When taken. Unless under special circumstances and for good cause shown, no deposition shall be taken within 10 days prior to the assigned date of the hearing in such proceeding, and when the deposi-

tion is taken in a foreign country it shall not be taken within 30 days prior to such date of hearing.

(d) Fees. A witness whose deposition is taken pursuant to these rules and the officer taking same, unless he be employed by the Commission, shall be entitled to the same fee paid for like service in the courts of the United States, which fee shall be paid by the party at whose instance the deposition is taken.

Rule 58. Depositions; petitions. A petition requesting an order to take a deposition shall be filed with due regard to the time periods specified in rule 57(c) and shall set forth the name and address of the witness, the place where, the time when, the name and office of the officer before whom, and the cause or reason why such deposition should be taken.

Rule 59. Depositions; order; interrogatories—(a) Order. If the petition requesting an order to take a deposition is granted which action may be taken without awaiting the possible filing of a reply, the Commission will serve upon the parties an order which will name the witness whose deposition is to be taken, and specify the time when, the place where, and the officer before whom the witness is to testify, but such time and place, and the officer before whom the deposition is to be taken, so specified in the Commission's order, may or may not be the same as set out in the petition.

(b) Interrogatories. In lieu of participating in the oral examination, parties served with the order for the taking of a deposition may promptly transmit written interrogatories to the officer, who shall pro-

pound them to the witness and record the answers verbatim, but it is not necessary that such interrogatories be served upon the party at whose instance the deposition is taken.

Rule 60. Depositions; recordation of testimony. The officer before whom the deposition is to be taken shall observe the provisions respecting appearances (rule 71(a)), and typographical specifications (rule 15), put the witness on oath, and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise to record the evidence.

Rule 61. Depositions; objections. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections.

Rule 62. Depositions; deponent's signature. When the testimony is fully transcribed or otherwise recorded the deposition of each witness shall be submitted to him for examination and shall be read to or by him. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The depo-

sition shall then be signed by the witness, unless the parties by stipulation waive the signing, or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall state at the foot thereof the fact of the waiver or of the illness or absence of the witness, or the fact of the refusal to sign, together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless, on a motion to suppress, the Commission finds that the reasons given for the refusal to sign are sufficient to require rejection of the deposition in whole or in part.

Rule 63. Depositions; officer's attestation. The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and that the officer is not of counsel or attorney for any of the parties, and that he is not interested in the event of the proceedings.

Rule 64. Depositions; return to Commission. The officer shall securely seal the deposition in an envelope endorsed with the title of the proceeding, and shall promptly send the original and one copy thereof, together with the original and one copy of all exhibits, by registered mail to the Secretary of the Commission. The deposition must reach the Commission not later than 5 days before the date of the hearing at which it is to be offered as evidence.

Rule 65. Depositions; notice of filing. The party taking the deposition shall give prompt notice of its filing to all other parties.

Rule 66. Depositions; copies. Upon payment of reasonable charges therefor, the officer before whom the deposition is taken shall furnish a copy of it to any interested party or to the deponent.

Rule 67. Depositions; inclusion in record. At the oral hearing, if one is held, the deposition shall be offered in evidence by the party at whose instance it was taken. If not offered by such party, it may be offered in whole or in part by the adverse party. If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it, which is relevant to the part introduced, and any party may introduce any other parts. Such deposition shall be admissible in evidence subject to such objections as to competency of the witness, or to the competency, relevancy, or materiality of the testimony as were noted at the time of taking of said deposition, or are made at the time it is offered in evidence.

HEARINGS

Rule 68. Prehearing conferences—(a) Purposes. Upon written notice by the Commission in any proceeding, or upon written or oral instruction of an officer, parties or their attorneys may be directed to appear before an officer at a specified time and place for a conference, prior to or during the course of a hearing, or in lieu of personally appearing to submit suggestions in writing, for the purpose of formulating issues and considering:

(1) The simplification of issues;

(2) The necessity or desirability of amending the pleadings either for the purpose of clarification, amplification, or limitation;

(3) The possibility of making admissions of certain averments of fact or stipulations concerning the use by either or both parties of matters of public record, such as annual reports and the like, to the end of avoiding the unnecessary introduction of proof;

(4) The procedure at the hearing;

(5) The limitation of the number of witnesses;

(6) The propriety of prior mutual exchange between or among the parties of prepared testimony and exhibits; and

(7) Such other matters, including disposition of requests for discovery, as may aid in the simplification of the evidence and disposition of the proceeding.

(b) Facts disclosed privileged. Facts disclosed in the course of the prehearing conference are privileged and, except by agreement, shall not be used against participating parties either before the Commission or elsewhere unless fully substantiated by other evidence.

(c) Recordation and order. Action taken at the conference, including a recitation of the amendments allowed to the pleadings, the agreements made by the parties as to any of the matters considered and defining the issues, shall be recorded in an appropriate order, unless the parties enter upon a written stipu-

lation as to such matters, or agree to a statement thereof made on the record by the officer.

(d) Objection to the order; subsequent proceedings. If an order is entered a reasonable time shall be allowed to the parties to present objections on the ground that it does not fully or correctly embody the agreements reached at such conference. Thereafter the terms of the said order or modification thereof, the written stipulation, or statement of the officer, as the case may be, shall determine the subsequent course of the proceedings, unless modified to prevent manifest injustice.

Rule 69. Stipulations. Apart from the procedure contemplated by the prehearing provisions (rule 68), and upon permission granted, the parties may in the discretion of the officer, by stipulation in writing filed with the Commission at any stage of the proceeding, or orally made at the hearing, agree upon any pertinent facts in the proceeding. It is desired that the facts be thus agreed upon so far as and whenever practicable.

Rule 71. Appearances; standard of conduct; absence from hearing—(a) Who may appear. Any individual may appear for himself, and any member of a partnership which is a party to any proceeding may appear for such partnership upon adequate identification. A bona fide officer or a full-time employee of a corporation, association, or of an individual may appear for such corporation, association, or individual by permission of the officer presiding at the hearing. A party also may be represented by a practitioner.

(b) Appearances. An appearance may be either general, that is, without reservation, or it may be special, that is, confined to a particular issue or question. When a practitioner enters an appearance at a hearing he will be expected to represent his client faithfully until the completion of the proceeding in which he has been retained, or until the completion of the part of the proceeding for which he has specially appeared. A practitioner who has entered his appearance at the hearing shall not be permitted to withdraw from the hearing, or wilfully to absent himself therefrom, except for good cause and, wherever practicable, only with the permission of the presiding officer. If a person desires to appear specially, he must expressly so state when he enters his appearance and at that time he shall also state the questions or issues to which he is confining his appearance; otherwise, his appearance will be considered as general.

(c) Standard of conduct. Contemptuous conduct by any person appearing at a hearing shall be ground for his exclusion by the presiding officer from the hearing.

(d) Absence from hearing. If a party or his representative shall, after entering an appearance, attempt to withdraw from the hearing in a manner other than that specified in paragraph (b) of this rule, the Commission on its own motion, or on motion of any party to the proceeding, may take such action as, in the interest of justice and the protection of the lawful rights of all parties to the proceeding, the cir-

cumstances of the case may warrant, including the striking out of all or any part of any pleading of the offending party, and including the possible dismissal of the action or proceeding, or any part thereof, the entry of an order of default against that party, or the disciplining of the practitioner concerned.

Rule 72. Intervention; petitions—(a) Content generally. A petition for leave to intervene must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or opposition to the relief sought. If the proceeding be by formal complaint and affirmative relief is sought by petitioner, the petition should conform to the requirements for a formal complaint.

(b) When filed. A petition for leave to intervene in any proceeding should be filed prior to or at the time the proceeding is called for hearing, but not after except for good cause shown.

(c) Broadening issues; filing. If the petitioner seeks a broadening of the issues and shows that they would not thereby be unduly broadened, and in respect thereof seeks affirmative relief, the petition should be filed in season to permit service upon and answer by the parties in advance of the hearing.

(d) Copies; service; replies. When tendered at the hearing, sufficient copies of a petition for leave to intervene must be provided for distribution as motion papers to the parties represented at the hearing. If leave be granted at the hearing, one additional copy must be furnished for the use of the Commis-

sion. When a petition for leave to intervene is not tendered at the hearing, the original and two copies of the petition shall be submitted to the Commission together with a certificate that service in accordance with rule 22 has been made by petitioner. Any reply in opposition to a petition for leave to intervene not tendered at the hearing must be filed within 20 days after service. In the discretion of the Commission leave to intervene may be granted or denied before the expiration of the time allowed for replies.

(e) Disposition. Leave will not be granted except on averments reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted the petitioner thereby becomes an intervener and a party to the proceeding.

Rule 73. Participation without intervention. In an investigation proceeding, in a proceeding under paragraphs (18) to (20) inclusive of section 1 [49 U.S.C.A. § 1(18)-(20)], or sections 5 and 13a of Part I [49 U.S.C.A. § 5, 13a], in application proceedings under Parts II, III, and IV [49 U.S.C.A. §§ 301 et seq., 901 et seq., and 1001 et seq.], and in a proceeding of any one of the characters herein enumerated when heard on a consolidated record with a complaint proceeding, but in no other proceeding, an appearance may be entered at the hearing without filing a petition in intervention or other pleading, if no affirmative relief is sought, if there is full disclosure of the identity of the person or persons in whose behalf the appearance is to be entered, if the interest of such person in the proceeding and the po-

sition intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed. A person in whose behalf an appearance is entered in this manner becomes a party to the proceeding.

Rule 75. Evidence; admissibility generally. Any evidence which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, shall be admissible in hearings before the Commission. The rules of evidence shall be applied in any proceeding to the end that needful and proper evidence shall be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.

Rule 77. Evidence; prepared statements. With the approval of the officer, a witness may read into the record, as his testimony, statements of fact or expressions of his opinion prepared by him, or written answers to interrogatories of counsel, or a prepared statement of a witness who is present at the hearing may be received as an exhibit, provided that the statement shall not include argument; that before any such statement is read, or admitted in evidence the witness shall deliver to the officer, the reporter, and to opposing counsel as may be directed by the officer, a copy of such statement or of such interrogatories and his written answers thereto; and that the admissibility of the evidence contained in such statement

shall be subject to the same rules as if such testimony were produced in the usual manner, including the right of cross-examination of the witness. Such approval ordinarily will be denied when in the opinion of the officer the memory or demeanor of the witness may be of importance.

Rule 78. Evidence; official records. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified

tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry. This rule does not prevent the proof of official records or of entry or lack of entry therein or official notice thereof by a method authorized by any applicable statute or by the rules of evidence.

Rule 79. Evidence; entries in regular course of business. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, will be admissible as evidence thereof if it shall appear that it was made in the regular course of business, and that it was the regular course of business to make such memorandum or record at the time such record was made, or within a reasonable time thereafter.

Rule 80. Evidence; documents containing matter not material. When material and relevant matter offered in evidence is in a document containing other matter not material or relevant, the offering party shall produce the document at the hearing, shall plainly designate the matter so offered, and shall accord to the officer and to participating counsel an opportunity to inspect it. Unless it is desired to read such matter into the record, and the officer so directs, true copies in proper form of the material and relevant matter taken from the document may be received as an exhibit, but other parties shall be affiorded an opportunity to introduce in evidence, in like manner,

other portions of such document if found to be material and relevant. The document itself will not be received.

Rule 82. Evidence; records in other Commission proceedings. If any portion of the record before the Commission in any proceeding other than the one on hearing is offered in evidence a true copy of such portion shall be presented for the record in the form of an exhibit unless:

(a) The party offering the same agrees to supply such copy later at his own expense, if and when required by the Commission; and

(b) The portion is specified with particularity in such manner as to be readily identified; and

(c) The parties represented at the hearing stipulate upon the record that such portion may be incorporated by reference, and that any other portion offered by any other party may be incorporated by like reference subject to paragraphs (a) and (b) of this rule; and

(d) The officer directs such incorporation. Any such portion so offered, whether in the form of an exhibit or by reference, shall be subject to objection.

Rule 83. Evidence; abstracts of documents. When documents, such as freight bills or bills of lading, are numerous, the officer may refuse to receive in evidence other than a limited number of such documents said to be typical. Instead he may instruct, if the proffer be for the purpose of proving damage, that introduction be deferred until there is opportunity

to comply with rule 100. If the proffer be for other purpose the officer may require the party in orderly fashion to abstract the relevant data from the documents, affording other parties reasonable opportunity to examine both the documents and the abstract, and thereupon offer such abstract in evidence in exhibit form.

Rule 84. Evidence; exhibits—(a) Generally. Exhibits of a documentary character may have a maximum width of 22 inches by 12½ inches in height. Whenever practicable the sheets of each exhibit and the lines of each sheet should be numbered. If the exhibit consists of five or more sheets the first sheet or title-page should be confined to a brief statement of what the exhibit purports to show, with reference by sheet and line to illustrative or typical examples contained therein. The exhibit should bear an identifying number, letter, or short title which will readily distinguish it from other exhibits offered by the same party. It is desirable that, whenever practicable, rate comparisons and other evidence should be condensed into tables. Whenever practicable, especially in proceedings in which it is likely that many documents will be offered, all the documents produced by a single witness should be assembled and bound together, suitably arranged and indexed, so that they may be identified and offered as one exhibit. Exhibits should not be argumentative and should be limited to statements of fact, and be relevant and material to the issue, which can better be shown in that form than by oral testimony.

(b) Reference to tariff authority, routes, and distances. All exhibits showing rates, fares, charges, or other tariff or schedule provisions must, by appropriate Interstate Commerce Commission number reference, indicate the tariff or schedule authority therefor, and if distances are shown must also show the authority therefor and, by lines, highways, or waterways, and junction points, the routes over which the distances are computed; except that the routes over which the distances are computed need not be shown when such distances are specifically published in a tariff or schedule lawfully on file with the Commission, or definitely ascertainable from a tariff or schedule on file with the Commission showing rates prescribed by the Commission and based on short-line distances, or short-highway distances, provided the exhibit makes specific reference to such tariff or schedules as provided by this rule.

(c) Copies. Unless the officer shall otherwise direct, the original and one copy of each exhibit of a documentary character shall be furnished for the use of the Commission—original to be delivered to the reporter, and the copy to the officer. If the hearing be before a board, a copy of the exhibit shall be furnished to each member of the board, unless the board otherwise directs. Unless the officer for cause directs otherwise, a reasonable number of copies shall be furnished to counsel in attendance at the hearing. Unless the officer shall otherwise direct, in proceedings under the Uniform Bankruptcy Act [11 U.S.C.A. § 1 et seq.], the original and three copies of every exhibit of

a documentary character shall be furnished for use of the Commission—original to be delivered to the reporter, and the three copies to the officer.

(d) Interchange prior to hearing.—Whenever practicable, the parties should interchange copies of exhibits or other pertinent material or matter before or at the commencement of the hearing; and the Commission or presiding officer may so direct.

(e) When excluded how treated. In case an exhibit has been identified, objected to, and excluded, the officer will develop whether the party offering the exhibit withdraws the offer, and if so, permit the return of the exhibit to him. If the excluded exhibit is not withdrawn it should be given an exhibit number for identification and be incorporated in the record. Exhibit numbers once used for identification will not be duplicated thereafter.

Rule 86. Evidence; filing of subsequent to hearing; copies. Except as provided below or as expressly may be permitted in a particular instance, the Commission will not receive in evidence or consider as part of the record any documents, letters, or other writings submitted for consideration in connection with any proceeding after close of the hearing, and may return any such documents to the sender. Before the close of a hearing the officer may, at the request of a party or upon his own motion, or upon agreement of the parties, require that a party furnish additional documentary evidence supplementary to the existing record, within a stated period of time. Documentary evidence thus to be furnished will not be

assigned an exhibit number at the hearing, but the document will be given an exhibit number at the time of filing and the parties accordingly advised. Unless otherwise directed by the officer, the original and one copy of such submission shall be filed with the Commission.

Rule 87. Evidence; objections to. Formal exception to a ruling of an officer at a hearing is unnecessary. It is sufficient that a party, at the time the ruling is made or sought, make known to the officer on the record the action which he desires the officer to take or his objection to the action of the officer and his grounds therefor. An objection not pressed in brief will be considered as waived. Where no brief is filed an objection will be considered as waived if not pressed in exceptions or reply to exceptions, if filed, or in a separate petition dealing only with that objection.

Rule 88. Oral argument before officer.

If oral argument before the officer is desired, he should be so notified at or before the hearing and may arrange to hear the argument at the close of the testimony within such limits of times as he may determine, having regard to other assignments for hearing before him. Such argument will be recorded and made a part of the transcript of testimony, and will be available to the Commission for consideration in deciding the case. The making of such argument shall not preclude oral argument before the Commission and request therefor may be made as provided in Rule 98.

Rule 89. Continuance for further hearing. A continuance may be granted by the presiding officer if it is impossible to conclude a hearing within the time available, or for any reason a continuance is necessary or advisable, but a joint board shall not set a date and place for a continued hearing without first consulting the Commission. If consultation with the Commission is impracticable, the hearing shall be adjourned by the joint board to such time and place as the Commission subsequently shall determine.

Rule 90. Transcript of record—(a) Filing. After the close of the hearing the complete transcript of testimony taken and the exhibits shall be filed with the Commission.

(b) Corrections. A suggested correction in a transcript ordinarily will be considered only if offered not later than 20 days after the date each transcript is filed with the Commission. A copy of the letter (original only need be filed with the Commission) requesting the suggested corrections shall be served upon all parties of record and with 2 copies to the official reporter.

(c) No free copies. No free copies of transcript will be furnished to any party to any proceeding.

Rule 91. Briefs; content and arrangement—(a) Due date. The due date of each brief must appear on its front cover or title page.

(b) Table of contents; citations. A brief of more than 20 pages shall contain on its front flyleaves a table of contents and points made with page refer-

ences, the table of contents to be supplemented by a list of citations, alphabetically arranged, with references to the pages where they appear.

(c) Sketch or chart. In proceedings wherein misrouting or undue prejudice or preference are alleged, the complainant should include as part of the brief a small sketch or chart adequately reflecting the situation.

(d) Evidence abstract. A brief filed after a hearing should contain an abstract of the evidence relied upon by the party filing it, preferably assembled by subjects, with reference to the pages of the record, if written, or exhibit where the evidence appears. The abstract should follow the statement of the case and precede the argument. In the event the party elects not to include a separate abstract in his brief, he should give specific reference to the portions of the record, whether transcript or otherwise relied upon in support of the respective statements of fact made throughout the brief.

(e) Requested findings. Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make.

(f) Exhibit reproduction. Exhibits should not be reproduced in the brief, but may, if desired, be shown, within reasonable limits, in an appendix to the brief. Analyses of such exhibits should be included in the abstract of evidence under the subjects to which they pertain.

Rule 92. Briefs; when officer's report is served

In a proceeding which has been the subject of oral hearing, and in which an officer's report is to be prepared and served, which fact will be stated by the officer on the record, only one brief shall be filed by each party. The officer shall fix for all parties the same time within which to file briefs, which time shall not exceed 45 days from the close of the hearing unless otherwise ordered by the Commission. Reply briefs are not permitted unless ordered by the Commission.

Rule 93. Briefs; when officer's report is not served

In a proceeding which has been the subject of oral hearing, and in which no officer's report is to be prepared and served, which fact will be stated by the officer on the record, only one brief shall be filed by each party. The officer shall fix for all parties the same time within which to file briefs, which time shall not exceed 45 days from the close of the hearing unless otherwise ordered by the Commission. Reply briefs are not permitted unless ordered by the Commission.

Rule 94. Briefs of interveners

Briefs of interveners shall be filed and served within the time fixed for the brief of the party in whose behalf the intervention is made.

Rule 95. Officer's report; when and how served. After expiration of the time set for filing briefs, if the proceeding be one in which a hearing has been

held, the officer's report will be prepared and served by mailing a copy to each party. An officer's report prepared in a proceeding in which a hearing has not been held will be served by mailing a copy to each party of record and to any other persons not parties to the proceeding who are believed to have an interest in the proceeding.

Rule 97. Effect of exceptions or absence thereof—(a) Upon report and recommended order. The filing of exceptions to a recommended order operates to stay the effectiveness of the order and thereafter decision by the Commission will be made in due course. If no exception is filed to the recommended order and the Commission does not stay it, the recommended order becomes the order of the Commission upon expiration of the period for filing exceptions provided in rule 96(b), or of any postponement of such period, or postponement of the effective date of such order, and a notice stating that the recommended order has, giving the date, become the order of the Commission will be mailed to the parties by the Commission.

(b) Upon proposed report. A proposed report will not become the decision of the Commission through failure to file objections, but in the absence of exceptions or of ascertained error the officer's statement of the issues and of the facts ordinarily will be taken by the Commission as the basis of its decision.

Rule 98. Oral argument before Commission—(a) Request; how made. If no officer's report is to be served, request for oral argument before the Commission must be made at hearing or by letter (origi-

nal only need be filed with the Commission) within 10 days after the hearing. If an officer's report is to be served, the request for oral argument must be included as part of the exceptions brief or reply thereto.

(b) Request for time allotment. If the petition is granted a notice will be served by the Commission upon the parties setting the date for the oral argument. At least 10 days before that date any party desiring to participate in the oral argument must make request by letter (original only need be filed with the Commission) for an allotment of time. Only those making request in this manner will be permitted to participate.

Rule 102. Petitions not otherwise covered

When the subject matter of any desired relief is not specifically covered by the rules in this part, a petition seeking such relief, which relief shall be construed as including appropriate discovery procedures, and stating the reasons therefor may be served and filed.

Rule 247. Special rules governing notice of filing of applications by motor carriers of property or passengers and brokers under sections 206 (except section 206(a) (6) relating to Certificates of Registration), 209, and 211, by water carriers under sections 302(e), 303, and 309, and by freight forwarders under section 410 of the Interstate Commerce Act, and certain other procedural matters with respect thereto.

(a) Scope and applicability of special rules—(1) Scope. These special rules govern the filing and

handling pursuant to the provisions of the Interstate Commerce Act of (i) applications for certificates, permits, and licenses respecting the transportation of property or passengers under sections 206 [49 U.S.C.A. § 306] (except section 206(a)(6) [49 U.S.C.A. § 306(a)(6)] relating to Certificates of Registration), 209, and 211 [49 U.S.C.A. §§ 309, and 311], (ii) applications for certificates, permits, and exemptions respecting the water transportation of property or passengers under sections 302(e), 303, and 309 [49 U.S.C.A. §§ 902(e), 903, and 909], and (iii) applications for permits to operate as freight forwarders and for certificates of abandonment under section 410 [49 U.S.C.A. § 1010]. Except as otherwise herein provided, the general rules of practice shall apply.

(2) Applicability. These special rules shall apply to all applications enumerated in subparagraph (1) of this paragraph and filed with the Commission on and after May 20, 1966, and to such of those applications filed prior to that time as the Commission may designate by appropriate publication in the FEDERAL REGISTER.

(b) Applications—(1) Form and content. An application filed with the Commission under these special rules shall be prepared in accord with and contain the information called for in the form of application prescribed by the Commission or in instructions which may have been issued by the Commission with respect to the filing of such an application.

(2) Copies and service. Copies of an application filed under these special rules shall be furnished in

such number and shall be filed and served in the manner and upon the persons specified in the form or instructions.

(3) Requests for handling applications without oral hearing. An applicant who believes its application is susceptible of handling without oral hearing may request such handling when the application is filed. If such a request is made at that time, the applicant shall submit with its application original verified statements of the facts to which its witnesses would testify at an oral hearing if one were held, together with one copy thereof which need not be verified. Applicant shall furnish copies of its verified statements to interested persons upon request from such interested persons.

(c) Notice to interested persons. (1) Notice of the filing of applications to competitors and other interested persons will be given by the publication of a summary of the authority sought in the FEDERAL REGISTER. Such summaries will be prepared by the Commission, and it shall be the responsibility of applicant promptly to advise the Commission if the summary does not properly describe the authority sought. No other notice by applicants to interested persons is required, except that applicants are not relieved from the obligation to file copies of applications with Governors, State Boards, and Regional Directors of the Commission's Bureau of Operations and Compliance as may be required by the prescribed form of the application.

(2) Amendments. Except for good cause shown, amendments to applications which broaden the scope of the proposed operations will not be allowed if tendered after notice of the filing of an application has been published in the *Federal Register*. Restrictive amendments acceptable to the Commission may be submitted at any time, but if tendered after such publication, they may be allowed only in the discretion the Commission or by the hearing officer if the matter is assigned for hearing or prehearing conference.

(6) Except where a restrictive amendment has been made as provided in subparagraph (5) of this paragraph, or for good cause shown, the failure of any person filing a protest to an application to appear at a hearing scheduled thereon shall be construed as a waiver of its right to participate further in the proceeding; such person shall no longer be considered as a party to the proceeding, and it and any representative responsible for its participation in the proceeding may be subject to censure for failure to appear. In addition, the mere appearance of protestant without the presentation of evidence of protestant's own operations and particular interest in the application may, in the absence of good cause shown, subject protestant and its representative to similar censure.

(7) An interested person, not a protestant, desiring to receive notice of the time and place of any hearing, conference, or other proceedings shall notify the Commission by telegram or letter (original and

one copy) within 30 days from the date of the publication of the notice of the filing of the application in the FEDERAL REGISTER.

(e) Hearing or other procedures to be followed—(1) Determination. The Commission will determine whether an assignment for oral hearing should be made, after notice to interested persons of the filing of the application has been published in the FEDERAL REGISTER and the period for filing protests has expired. At or prior to such time, any applicant who does not intend to prosecute its application should promptly request dismissal thereof.

(2) Uncontested proceedings. Proceedings in which no protests are filed within 30 days after publication of notice in the FEDERAL REGISTER, and which are not assigned for oral hearing, will be determined on the basis of verified statements submitted by applicant. Where not submitted previously along with the application as provided in paragraph (b) (3) of this section, such statements, by order, will be required to be filed by the applicant with the Commission within the time prescribed in said order, failing which the application may be summarily dismissed for want of prosecution.

(3) Contested proceedings. In those contested proceedings which the Commission determines that assignment of an application for oral hearing is unnecessary, thereafter the procedure shall be in accordance with Rules 45(b), 46(b), and 47-54, inclusive, of the general rules of practice, except that only the original and one copy of any statement made

pursuant to Rule 51 need be filed with the Commission. All other contested proceedings which are subject to these rules will be assigned for oral hearing, unless other procedures are ordered.

(f) Withdrawal or dismissal of contested applications. If protests to its application have been filed, applicant shall, within 30 days after the period for filing protests has expired, notify the Commission in writing (1) that it is ready to proceed and prosecute the application, or (2) that it wishes to withdraw the application. Failure so to notify the Commission will be construed to mean that applicant has no further interest in the application, and the application will thereupon be dismissed by the Commission. Withdrawal of the application after the 30-day period or failure by applicant to appear at a hearing scheduled thereon will, except for good cause shown, subject applicant and its representative to censure.

(g) Notice of hearing, conference or other proceedings—(1) Initial assignment. Notice of the time and place of any hearing, conference, or other proceedings will be given to applicant's representative, applicant, protestants, and other interested parties by mailing to them the order or notice assigning the application for hearing, conference, or other procedure.

(2) Assignment of an application for hearing concurrently with notice of its filing. For the convenience of the Commission in handling applications related to one or more applications which already have been noticed in the FEDERAL REGISTER, when, in the

Commission's discretion, the public interest would be served, an application may be concurrently noticed and assigned for hearing provided appropriate publication in the FEDERAL REGISTER can be made at least 1 week prior to the assigned date of hearing. Where such action is taken, and regardless of any prior publication of the application, any interested person may, without filing a protest prior to the assigned hearing, appear at the hearing in opposition to the application so assigned and become a party and be entitled to participate in that proceeding.

(3) Requests for change. A request by any party for a change in the time or place of an assigned hearing must set forth good and sufficient cause for the action requested, must be in writing and filed with the Commission not less than 10 days before the assigned hearing date, except in emergency circumstances, and must be served on all known parties of record at the same time and by the same method of communication as service is made on the Commission. Where such requests are filed less than 10 days before the date of hearing, the petitioning party shall state the reasons for his failure to make such request within the prescribed 10 days.

(4) Notice of changes. The applicant's representative (or applicant if it has no representative), protestants, and those who request notice of changes in time or place of hearing, conference, or other proceeding will be informed of such changes if notice is given by mail. If telegraphic notice becomes necessary, notice of such changes will be given by telegram

only to those who request telegraphic notice at their expense.

(h) Intervention. Rule 73 relating to participation without intervention is inapplicable to applications subject to this section, except with respect to those persons seeking to intervene in support. No person who fails to file a protest as provided in these rules will be permitted to intervene in opposition in a proceeding except upon a showing of substantial reasons in a petition submitted in accordance with Rule 72.

(i) Drafting of recommended order and report by prevailing party. Applications in which oral hearings are held and in which the hearing officer can announce his decision, either (1) on the record after the close of the taking of testimony or (2) by appropriate notification to the parties after the filing of briefs, may be made the subject of a report and recommended order, prepared by the party or parties in whose favor the hearing officer decides, within a period specified by the hearing officer. The hearing officer will make such changes as he considers appropriate in the draft prepared for him.

Appendix A—Code of Ethics for Practitioners Before the Interstate Commerce Commission

Preamble

No rules of conduct can be framed which will particularize all the duties of the practitioner in the varying phases of litigation or in his relations to clients, adversaries, other practitioners, the Commission and the public. The following canons of ethics are adopted as a general guide for those admitted to practice before the Interstate Commerce Commission.

It will be remembered that the practitioners before the Commission include (a) lawyers, who have been regularly admitted to practice law, and (b) others having traffic or other technical experience qualifying them to aid the Commission in administration of the Interstate Commerce Act and related acts of Congress. The former are bound by a broad code of ethics and unwritten rules of professional conduct which apply to every activity of a lawyer; for the latter, no code of ethics has been written heretofore. The following canons do not release the lawyer from any of the duties or principles of professional conduct by which lawyers are bound. They apply alike to all practitioners before the Commission and the setting forth therein of particular duties or principles of conduct should not be construed as a denial of the existence of others equally imperative although not specifically mentioned. The world "Commission" as used herein includes Divisions of the Commission, and the representatives of the Commission, whether mem-

bers, examiners, or other employees connected with the matter in hand.

Canons of Ethics

1. *Standards of ethical conduct in courts of United States to be observed.* These canons are in furtherance of the purpose of the Commission's rules of practice which enjoin upon all persons appearing in proceedings before it to conform, as nearly as may be, to the standards of ethical conduct required of practitioners before the courts of the United States; and such standards are taken as the basis for these specifications, modified in so far as the nature of the practice before the Commission requires.

2. *The duty of the practitioner to and his attitude towards the Commission.* It is the duty of the practitioner to maintain towards the Commission a respectful attitude, not for the sake of the temporary incumbent of the office, but for the maintenance of the importance of the functions he administers. *In many respects the Commission functions as a Court, and practitioners should regard themselves as officers of that Court and strive to uphold its honor and dignity.* The Commission, not being wholly free to defend itself is peculiarly entitled to receive the support of the practitioner against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a member or employee of the Commission it is the right and duty of the practitioner to submit his grievances to the proper authorities. In such cases,

but not otherwise, such charges should be encouraged and the person making them should be protected.

4. *Attempts to exert political influence on the Commission.* It is unethical for a practitioner to attempt to sway the judgment of the Commission by propaganda, or by enlisting the influence or intercession of members of the Congress or other public officers, or by threats of political or personal reprisal.

5. *Attempts to exert personal influence on the Commission.* Marked attention and unusual hospitality on the part of a practitioner to a Commissioner, examiner, or other representative of the Commission, uncalled for and unwarranted by the personal relations of the parties, subject both to misconstruction of motive and should be avoided. A self-respecting independence in the discharge of duty, without denial or diminution of the courtesy and respect due the official station is the only proper foundation for cordial personal and official relations between Commission and practitioners.

7. *The practitioner's duty in its last analysis.* No client, corporate or individual, however powerful, no cause, civil or political however important, is entitled to receive, and no practitioner should render, any service or advice involving disloyalty to the law or disrespect of its official ministers, or corruption of any person or persons exercising a public office or employment or private trust, or deception or betrayal of the public. In rendering any such improper service or advice the practitioner invites and merits stern and just condemnation. Correspondingly, he advances

the honor of his calling and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, although until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all he will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

8. *Private communications with the Commission. In the disposition of contested proceedings brought under the Interstate Commerce Act* [*49 U.S.C.A. §§1 et seq., 301 et seq., 901 et seq., 1001 et seq., 1231 et seq.*] *the Commission exercises quasi-legislative powers, but it is nevertheless acting in a quasi-judicial capacity.* It is required to administer the Act and to consider at all times the public interest beyond the mere interest of the particular litigants before it. *To the extent that it acts in a quasi-judicial capacity, it is grossly improper for litigants, directly or through any counsel or representative, to communicate privately with a commissioner, examiner or other representative of the Commission about a pending cause, or to argue privately the merits thereof in the absence of their adversaries or without notice to them.* Practitioners at all times should scrupulously refrain in their communications to and discussions with the Commission and its staff from going beyond ex parte

representations that are clearly proper in view of the administrative work of the Commission.

9. Adverse influences and conflicting interests. It is the duty of a practitioner at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of the person to represent or assist him.

It is unethical to represent conflicting interets, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon a practitioner represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainsr or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

10. Joint association of practitioners and conflicts of opinion. A client's proffer of the assistance of additional practitioner should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A practitioner should decline association as colleague if it is objectionable to the practitioner first retained, but if the client should relieve the practitioner first retained, another may come into the case.

When practitioners jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted by them unless the nature of the difference makes it impracticable for the practitioner whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another practitioner are unworthy of those who should be brethren, but, nevertheless, it is the right of any practitioner, without fear or favor, to give proper advice to those seeking relief against an unfaithful or neglectful practitioner, generally after communication with the practitioner of whom the complaint is made.

11. Withdrawal from employment. The right of a practitioner to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The practitioner representing him should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the practitioner's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligations as to fees or expenses, the practitioner may be warranted in withdrawing on due notice to the client, allowing him time to employ another. So also when a practitioner discovers that his client has no case

and the client is determined to continue it; or even if he finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, he should refund such part of the retainer as has not been clearly earned.

12. Advising upon the merits of a client's cause. A practitioner should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. He should beware of bold and confident assurances to clients, especially where employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

13. Negotiations with opposing party. A practitioner should not in any way communicate upon the subject of controversy with a party represented by another practitioner except upon express agreement with the practitioner representing such party; much less should he undertaken to negotiate or compromise the matter with him, but should deal only with the practitioner who represents the other party. It is incumbent upon the practitioner most particularly to avoid everything that may tend to mislead a party not represented by a practitioner, and he should not undertake to advise him as to the law.

14. Fixing the amount of the fee. In fixing fees, practitioners should avoid charges which overestimate

their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, although his poverty may require a less charge, or even none at all.

15. Compensation, commission and rebates. A practitioner should accept no compensation, commissions, rebates, or other advantages from parties to the proceeding other than his client without the knowledge and consent of his client after full disclosure.

16. Contingent fees. Contingent fees should be such only as are sanctioned by law. In no case, except a charity case, should they be entirely contingent upon success.

17. Division of fees. No division of fees for services is proper, except with a member of the bar or with another practitioner, based upon a division of service or responsibility. It is unethical for a practitioner to retain laymen to solicit his employment in pending or prospective cases, and reward them by a division of fees, and such a practice cannot be too severely condemned.

18. Suing clients for fees. Controversies with clients covering compensation are to be avoided in so far as compatible with self-respect and with the right to receive reasonable recompense for services: and lawsuits against clients should be resorted to only to prevent injustice, imposition or fraud.

19. Acquiring interest in litigation. The practitioner shall not purchase or otherwise acquire any

pecuniary interest in the subject matter of the litigation which he is conducting.

20. Expenses. A practitioner may not properly agree with a client that the practitioner shall pay or bear the expenses of litigation. He may in good faith advance expenses as a matter of convenience but subject to reimbursement by the client.

21. Witnesses. A practitioner shall not undertake that the compensation of a witness shall be contingent upon the success of the cause in which he is called. If the ascertainment of truth requires that a practitioner should seek information from one connected with or reputed to be biased in favor of an adverse party, he is not thereby deterred from seeking to ascertain the truth from such person in the interest of his client.

22. Dealing with trust property. Money of the client or other trust property coming into the possession of the practitioner should be reported promptly, and, except with the client's knowledge and consent, should not be commingled with the practictioner's private property or be used by him.

23. How far a practitioner may go in supporting a client's cause. Nothing will operate more certainly to create or foster popular prejudice against practitioners as a class, and deprive them of that full measure of public esteem and confidence which belongs to the proper discharge of their duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the

duty of the practitioner to do whatever may enable him to succeed in winning his client's cause.

The practitioner owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of the disfavor of the Commission or public unpopularity should restrain him from full discharge of his duty. The client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his counsel to assert every such remedy or defense. But it is to be steadfastly borne in mind that this great trust is to be performed within and not without the bounds of the law. Admission to the privilege of appearing before the Commission as representing another does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

24. *Restraining clients from improprieties.* A practitioner should use his best efforts to restrain and to prevent his clients from doing those things which he himself ought not to do, particularly with reference to their conduct towards the Commission, other practioners, witnesses and suitors. If a client persists in such wrongdoing the practitioner should terminate their relations.

25. *Ill-feeling and personalities between advocates.* Clients, not their representatives, are the litigants.

Whatever may be the ill-feeling existing between clients, it should not be allowed to influence practitioners in their conduct and demeanor toward each other or toward suitors in the case. All personalities between practitioners should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncracies of practitioners on the other side. Personal colloquies between practitioners which cause delay and promote unseemly wrangling should also be carefully avoided. Their statement should be addressed to the Commission.

26. *Treatment of witnesses and litigants.* A practitioner should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudice of a client in the trial or conduct of a cause. The client cannot be made the keeper of the practitioner's conscience in such matters. He has no right to demand that the practitioner representing him shall abuse the opposing party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

27. (None.)

28. *Discussion of pending litigation in public press.* Attempts to influence the action and attitude of the members and examiners of the Commission through propaganda, or through colored or distorted articles, in the public press, are more apt to react against than in favor of the parties resorting to such

measures. On the other hand, it is not against the public interest or unfair to the Commission that the facts of pending litigation shall be made known to the public through the press in a fair and unbiased manner and in dispassionate terms. Practitioners should themselves avoid, and should counsel their clients against, giving to the public press any press notices or statements of a nature intended to inflame the public mind, to stir up possible hostility toward the Commission, or to influence the Commission's course and judgment as to pending or anticipated litigation. When the circumstances of a particular case appear to justify a statement to the public through the press, it is unethical to make it anonymously.

29. Candor and fairness. The conduct of practitioners before the Commission and with other practitioners should be characterized by candor and fairness. The non-technical character and liberality of the Commission's practice call for scrupulous observance of the principles of fair dealing and just considerations for the rights of others.

It is not candid or fair for a practitioner knowingly to misstate or misquote the contents of a paper, the testimony of a witness, the language or the argument of an opposing practitioner, or the language or effect of a decision or a text book; or, with knowledge of its invalidity to cite as authority a decision which has been overruled or otherwise impaired as a precedent or a statute which has been repealed; or in argument to assert as a fact that which has not been

proved, or to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A practitioner should not offer evidence, which he knows the Commission should reject, in order to get the same before the Commission by argument for its admissibility, or arguments upon any point not properly calling for determination. He should not introduce into an argument remarks or statements intended to influence the by-standers.

These and all kindred practices are unethical and unworthy of a practitioner.

30. Right of practitioner to control the incidents of the trial. As to incidental matters pending the trial, not affecting the merits of the cause or working substantial prejudice to the rights of the client, such as forcing the opposing practitioner to trial when he is under affliction or bereavement, forcing the trial on a particular day to the injury of the opposing practitioner when no harm will result from trial at a different time, agreeing to extensions of time and the like, the practitioner and not the client, must be allowed to judge. In such matters no client has a right to demand that his practitioner shall be illiberal or do anything therein repugnant to the practitioner's sense of honor and propriety.

31. Taking technical advantage of opposing practitioner; agreements with him. A practitioner should not ignore known customs or practice of the Commission, even when the law permits, without giving timely notice to the opposing practitioner. In so far as possible, important agreements affecting the rights of clients should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing.

32. Advertising, direct or indirect. The most worthy and effective advertisement possible is the establishment of a well-merited reputation for capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not improper. But solicitation of employment by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unethical. It is equally unethical to procure business by indirection through touters of any kind. Indirect advertisement for employment by furnishing or inspiring newspaper comments concerning causes in which the practitioner has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the practitioner's positions, and all other like self-laudation, lower the tone of the calling and are intolerable.

33. Professional card. The simple professional card mentioned in Canon 32 may with propriety contain

only a statement of the practitioner's name (and those of his associates), occupation, address, telephone number, and special branch or branches of practice. Such cards may be inserted in reputable lists and may give authorized references, or name clients with their permission.

34. Stirring up litigation, directly or through agents. It is unethical for a practitioner to volunteer advice that a proceeding be brought before the Commission, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unethical but it is indictable at common law. It is disreputable for a practitioner to hunt up defects or other causes of action and disclose them in order to be employed to bring complaint, or to breed litigation by seeking out those having claims for damages or any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office to seek his services. No complaint should be brought before the Commission by a practitioner except with the distinct knowledge and specific consent of the client in the particular case. A duty to the public and to the Association devolves upon every member having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disciplined or disbarred.

35. Justifiable and unjustifiable litigation. The practitioner must decline to conduct a cause or to

make a defense when convinced that it is intended merely to harass or to injure the opposing party, or to work oppression or wrong. But otherwise it is his right, and having accepted retainer, it becomes his duty, to insist upon the judgment of the Commission as to the merits of his client's claim. His appearance should be deemed equivalent to an assertion upon his honor that in his opinion his client's case is one proper for determination.

36. Responsibility for litigation. No practitioner is obliged to act either as adviser or advocate for every person who may seek to become his client. He has the right to decline employment. Every practitioner upon his own responsibility must decide what employment he will accept, what causes he will bring before the Commission for complainants, or contest for defendants or respondents. The responsibility for advising as to questionable transactions, for bringing questionable proceedings, for urging questionable defenses is his alone. He cannot escape it by urging as excuses that he is only following his client's instructions, or that he is under a stated retainer or in the regular employment of his client.

37. Discovery of imposition and deception. When a practitioner discovers that some fraud or deception has been practiced, which has been unjustly imposed upon the Commission or a party, he should endeavor to rectify it; first by advising his client to forego any advantage thus unjustly gained and, if his client refuses, by promptly informing the injured person or

his counsel (practitioner), so that appropriate steps may be taken.

38. Upholding the honor of the calling. Practitioners should expose without fear or favor before the proper tribunals corrupt or dishonest conduct and should accept without hesitation employment against a practitioner who has wronged his client. The practitioner upon the trial of a cause in which perjury has been committed owes it to the Commission and to the public to bring the matter to the knowledge of the prosecuting authorities. The practitioner should aid in guarding the bar of the Commission against admission thereto of candidates unfit or unqualified because deficient in either moral character or education. A practitioner should propose no person for admission to practice before the Commission unless from personal knowledge or upon reasonable inquiry he sincerely believes and is able to vouch that such person possesses the qualifications prescribed in the Commission's rules of practice. He should strive at all times to uphold the honor and maintain the dignity of his calling and to improve not only the law but the administration of justice.

39. Intermediaries. The services of a practitioner should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and practitioner. His responsibility and qualifications are individual. He should avoid all relations which direct the performance of his duties in the interest of such intermediaries. His relation to

the client should be personal, and the responsibility should be direct to the client.

He may accept employment from any organization such as an association, club or trade organization, authorized by law to be a party to proceedings before the Commission, to render services in such proceedings in any matter in which the organization, as an entity, is interested. This employment should only include the rendering of such services to the members of the organization in respect to their individual affairs as are consistent with the free and untrammeled performance of his duties to the Commission.

Nothing in this canon shall be construed as conflicting with canon 17.

40. Retirement from public employment. A practitioner, having once held public office or having been in the public employ, should not after his retirement, accept employment as an advocate or adviser in the same proceeding or as to the same, or substantially the same, facts as were involved in any specific question which he investigated or passed upon in a judicial or quasi-judicial capacity while in such office or employ, whether the same or different parties are concerned.

41. Confidences of a client. The duty to preserve his client's confidences in the course of his employment outlasts the practitioner's employment, and extends as well to his employees. None of them should accept employment which involves the disclosure or use of these confidences, either for the private advan-

tage of the practitioner or his employees or to the disadvantage of the client, without knowledge and consent of the client even though there are other available sources of such information. A practitioner should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a practitioner is falsely accused by his client, he is not precluded from disclosing the truth in respect to the false accusation. The announced intention of a client to commit a crime is not included within the confidences which a practitioner is bound to respect. He may properly make such disclosures as to prevent the act or protect those against whom it is threatened.

Appendix C—Ex Parte Communications

1. Ex parte communications. (a) No person who is a party to, or counsel or agent of a party, or who intercedes in, any on-the-record proceeding, shall submit any ex parte communication concerning the merits of the proceeding to any member of the Commission, hearing officer, member of a joint board, or to any employee of the Commission participating in the decision in such proceeding.

(b) No member of the Commission, hearing officer, member of a joint board, or employee of the Commission participating in the decision in such proceeding shall invite or knowingly entertain any prohibited ex parte communication, or make any such communication to any party to, or counsel or agent of a party, or any other person who he has reason to know may

transmit such communication to a party or party's agent.

2. The prohibitions of paragraph 1 apply from the time an on-the-record proceeding is noticed for oral hearing or the taking of evidence by modified procedure or from such earlier time as the Commission may fix by rule or order in the particular case.

3. For the purposes hereof:

(a) "On-the-record proceeding" means a proceeding required by the Constitution, by statute, by Commission rule, or by order in the particular case, to be decided solely upon the record made in a Commission hearing.

(b) "Person who intercedes in any proceeding" means any individual outside the Commission (whether in public or private life), partnership, corporation, or association, other than a party or an agent of a party, who volunteers a communication which he may be expected to know may advance or adversely affect the interest of a particular party to the proceeding, whether or not he acts with the knowledge or consent of any party or any party's agent.

(c) "Ex parte communication concerning the merits" includes both oral and written communications, but the following classes of ex parte communications shall not be prohibited:

(1) Any oral or written communication which all the parties to the proceeding agree, or which the Commission, the hearing officer, or joint board formally rules, may be made on an ex parte basis.

(2) Any oral or written communication of facts or contentions which have general significance for an industry subject to regulation if the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive issue in appending on-the-record proceeding in which he is interested.

(3) Any communication by means of any news medium which in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publications with respect to pending on-the-record proceedings.

(d) "Any employee of the Commission participating in the decision" includes personal assistants to members of the Commission, members of an employee review board appointed pursuant to Public Law 87-247 (1961) to whom the proceeding may be referred for decision, employees of the Commission Bureau (e.g., Operating Rights, Finance, Rates and Practices) whose responsibilities correspond to the nature of the proceeding, and the staff of the General Counsel's Office.

4. Any member of the Commission, hearing officer, employer of the Commission, or member of a joint board, participating in the decision who personally receives a written or oral communication which he believes is prohibited at the time received, shall transmit the written communication or a written summary of the substance of an oral communication promptly to the Chairman of the Commission together with a

written statement of the circumstances under which the communication was made, if not apparent from the communication itself. If the Chairman concludes that the communication is prohibited, or that the dictates of fairness require that it be made public, he shall instruct the Secretary to place the written communication or summary of the oral communication in the correspondence part of the public docket of the proceeding or take such other or further action as may be appropriate under all of the circumstances.

5. The Commission may censure, or suspend or revoke the privilege to practice before the agency, of any person who knowingly and willfully makes or solicits the making of a prohibited ex parte communication.

6. To the extent permitted by law, the relief or benefit sought by a party to a proceeding may be denied if the party, or an agent of the party, knowingly and willfully makes or solicits the making of a prohibited communication.

7. The Commission may censure, suspend, or dismiss, or institute proceedings for the suspension or dismissal of, any Commission employee who knowingly and willfully violates the foregoing prohibitions or requirements.

5. CALIFORNIA CONSTITUTION

Art. XII § 22

Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpenas and all necessary process and send for persons and papers; and the commission and each of the commisioners shall have the power to administer oaths, take testimony and punish for contempt *in the same manner and to the same extent as courts of record;* the commission may prescribe a uniform system of accounts to be kept by all railroad and other transportation companies.

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6. CALIFORNIA PUBLIC UTILITIES CODE

§ 312. Issuance and service of process: Fees

The commission and each commissioner may issue writs of summons, subpenas, warrants of attachment, warrants of commitment, and all necessary process in proceedings for contempt, in like manner and to

the same extent as courts of record. The process issued by the commission or any commissioner, extends to all parts of the State and may be served by any person authorized to serve process of courts of record, or by any person designated by the commission or a commissioner. The person executing any such process shall receive such compensation as is allowed by the commission, not to exceed the fees prescribed by law on August 8, 1915, for similar services, and such fees shall be paid in the same manner as provided in this part for payment of the fees of witnesses.

§ 1061. Operation except in accordance with provisions of part forbidden

No highway carrier, cement carrier, or petroleum irregular route carrier, shall operate or cause to be operated any auto truck, or other self-propelled vehicle not operated on rails, for the transportation of property as a common carrier for compensation on any public highway in this State except in accordance with the provisions of this part.

§ 1064. Fee to accompany application for certificate: Amount: Action of commission on request for certificate

Each application for a certificate of public convenience and necessity made under the provisions of this article shall be accompanied by a fee of five hundred dollars ($500).

Except in the case of cement carriers who seek a certificate on the basis of operations prior to June 1, 1963, and continuously thereafter, as provided in Sec-

tion 1063, the commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by the certificate such terms and conditions as, in its judgment, the public convenience and necessity require. Provided proper application is timely filed, the commission shall issue a certificate to each cement carrier conforming to the proof of good faith operations produced by such cement carrier with respect to its operations prior to June 1, 1963, and continuously thereafter.

§ 1069. Form and contents of application

An applicant shall submit his written verified application to the commission. The application shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the commission requires.

§ 1705. Who may appear at hearing: Witnesses: Making and filing of decision: Contents: Service of order: When order effective: Extension of time to comply with order

At the time fixed for any hearing before the commission or a commissioner, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. The decision

shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own force, take effect and become operative 20 days after the service thereof, except as otherwise provided, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order.

§ 1706. Record of proceedings

A complete record of all proceedings and testimony before the commission or any commissioner on any formal hearing shall be taken down by a reporter appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order or decision of the commission, a transcript of such testimony, together with all exhibits or copies thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission, but if the petitioner and the commission stipulate that certain questions alone and a specified portion only of the evidence shall be certified to the Supreme Court for its judgment, such stipulation and the questions

and the evidence therein specified shall constitute the record on review.

§ 1756. Time for application for review to Supreme Court: Return of writ: Certification of record

Within 30 days after the applicatoin for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified.

§ 1757. Introduction of new evidence: Limit of review: Finality of findings and conclusions

No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.

The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such

questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

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7. CALIFORNIA PUBLIC UTILITIES COMMISSION'S RULES OF PRACTICE AND PROCEDURE

5. (Rule 5) *Verification.* Applications or amendments thereto shall be verified by each applicant. Complaints or amendments thereto shall be verified by at least one complainant. Answers shall be verified by at least one of the defendants filing the same. If the party filing the pleading is a corporation or association, the pleading may be verified by an officer thereof.

Verification may be made before a notary public or by certification or declaration under the penalty of perjury.

6. (Rule 6) *Signature and Verification by Attorney.* Except in transfer proceedings (see Rule 35), the attorney for a party may sign and verify a pleading if such party is absent from the county where the attorney has his office, or from some cause is unable to sign and verify such pleading. When a pleading is signed and verified by the attorney, he shall set forth in the affidavit the reasons why the verification is not made by such party.

7. (Rule 7) *Copies.* Unless otherwise required by the Commission, and except as to complaints (see Rule 11), there shall be filed with the Commission an

original and twelve conformed copies of each pleading, or amendment thereof, and the original and twelve copies of each brief or petition for rehearing or petition for leave to intervene.

8. (Rule 8) *Amended Pleadings.* Amendments to pleadings, and amended pleadings, may be filed before hearing, provided they are served upon all known interested parties, filed at least five days before the hearing, and contain a certification of service. Thereafter, pleadings may be amended as permitted, or directed, by the Commission or the presiding officer.

21. (Rule 21) *Common Carrier Certificates.*

Carrier by Vessel, P.U. Code, Secs. 1007–1009
Express Corporation, P.U. Code, Sec. 1010
Freight Forwarder, P.U. Code, Sec. 1010
Passenger Stage Corporation, P.U. Code, Secs. 1031–1036
Highway Common Carrier, P.U. Code, Secs. 1063–1064
Petroleum Irregular Route Carrier, P.U. Code, Secs. 1063-1064, 1067-1069
Cement Carrier, P.U. Code, Secs. 1063-1064, 1067
Passenger Air Carrier, P.U. Code, Secs. 2740–2765

In addition to being drafted to comply with Rules 2 through 8, 15 and 16, applications for certificates under any of the above sections of the Public Utilities Code shall contain the following data, either in the body of the application or in exhibits attached thereto:

(a) The type of service being performed by applicant, a general description thereof, and a reference to the authority under which existing service is performed.

(b) The specific authority requested and the particular statutory provision under which the certificate is requested.

(c) If a carrier of property, a description of specified commodities proposed to be transported, and, if general commodities with exceptions are proposed to be transported, a statement specifying such exceptions.

(d) The geographical scope of the proposed operation, including the termini and other points proposed to be served, and a concise narrative description of the proposed route.

(e) A map or sketch of the route and points to be served, drawn to suitable indicated scale, and showing present and proposed operation by distinctive coloring or marking.

(f) The names of all common carriers with which the proposed service is likely to compete, and a certification that a copy of the application has been served upon or mailed to each such carrier named. Applications shall also name all other parties to whom copies of the application will be mailed. Applicants shall promptly notify the Commission of such mailing. Applicants shall also mail copies to such additional parties and within such times as may be designated by the Commission.

(g) Applications to inaugurate new passenger stage service shall name any state or local authorities located in the area or areas to be served, upon whom service of said application is hereby required to be made, and shall name any other parties to whom copies of the application will be mailed. Applicants shall also mail copies to such additional parties, and within such times as may be designated by the Commission.

(h) A statement of the rates or fares proposed to be charged and rules governing service. Applications for certificates need not contain tariffs, but shall indicate the level and nature of proposed rates and rules and may refer to tariffs on file with or issued by the Commission.

(i) A statement indicating the frequency of the proposed service. If "on call" service is proposed, the application shall set forth conditions under which such service would be performed.

(j) The kind and approximate number of units of equipment to be employed in the proposed service.

(k) A statement of financial ability to render the proposed service.

(*l*) Facts showing that the proposed operation is required by public convenience and necessity.

49. (Rule 49) *Prehearing Conference.* A presiding officer may hold a prehearing conference for the purposes of formulating or simplifying the issues, arranging for the exchange of proposed exhibits or prepared expert testimony, limitation of number of

witnesses, and such other matters as may expedite orderly conduct and disposition of the proceeding.

50. (Rule 50) *Facts Disclosed Privileged.* Facts disclosed in prehearing conferences are privileged. Except by agreement, they shall not be used against participating parties, before the Commission or elsewhere, unless proved by evidence other than that employed in disclosing such facts.

Article 14. Hearings.

51. (Rule 51) *Notice.* In complaint or investigation proceedings, the Commission will give notice of hearing at least ten days before such hearing, unless it be found that public necessity requires hearing at an earlier date. Comparable notice ordinarily will be given when hearings are held in application proceedings.

52. (Rule 52) *Publication of Notice.* In rate increase applications filed by gas, electric, telephone and water utilities, unless specifically exempted or otherwise provided for by the Commission, the applicant, not less than five nor more than thirty days prior to the initial hearing, shall give notice of hearing to entities or persons who may be affected thereby, (1) by posting hearing notice in public places and (2) by publishing notice in a newspaper, or newspapers of general circulation in the area or areas concerned, of the time, date and place of such hearing. If ordered by the assigned Commissioner or Examiner, applicant shall give notice by bill inserts or by mail to the last known billing address of customers on applicant's

records. Proof of such publication and sample copies of the other notices must be filed at or before the hearing.

In other types of applications applicant shall provide such notice to the public as the asigned Commissioner or Examiner may designate for such proceeding. Sample copies of forms of such notices shall be filed at or before the hearing.

Article 15. Subpoenas.

59. (Rule 59) *Requests for Subpoenas.* Requests for the issuance of subpoenas, requiring the attendance of a witness for the purpose of taking oral testimony before the Commission, shall be in writing and may be made by letter or wire.

60. (Rule 60) *Subpoenas Duces Tecum.* Requests for the issuance of subpoenas for the production of documents or records shall be in writing and shall be accompanied by an affidavit specifying the particular document or record, or part thereof, desired to be produced, stating the reasons why the production thereof is believed to be material and relevant to the issues involevd.

61. (Rule 61) *Who May Issue.* Subpoenas may be issued by the Commission, a Commissioner, an Examiner, the Secretary, or an Assistant Secretary. No subpoenas shall issue unless applicant therefor establishes that he has a proper relation to the matter, and gives the name and address of the desired witness. Signed and sealed blank subpoenas will not be issued to anyone. The name and address of the witness

shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. Subpoenas shall show at whose instance the subpoena is issued.

Article 16. Presiding Officers.

62. (Rule 62) *Designation.* When evidence is to be taken in a proceeding before the Commission, one or more of the Commissioners or an Examiner, may preside at the hearing.

Article 17. Evidence.

64. (Rule 64) *Form and Admissibility.* Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved.

65. (Rule 65) *Rulings.* The presiding officer shall rule on the admissibility of all evidence. Such rulings may be reviewed by the Commission in determining the matter on its merits. In extraordinary circumstances, where prompt decision by the Commission is necessary to promote substantial justice, the presiding officer may refer the matter to the Commission for determination.

66. (Rule 66) *Objections and Exceptions.* When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

67. (Rule 67) *Offer of Proof.* An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained.

68. (Rule 68) *Prepared Testimony.* With the approval of the presiding officer, a witness may read into the record his testimony on direct examination. Before any prepared testimony is read, unless excused by the presiding officer; the witness shall deliver copies thereof to the presiding officer, the reporter, and all counsel or parties. Admissibility shall be subject to the rules governing oral testimony. If the presiding officer deems that substantial saving in time will result, and where the parties so agree, prepared testimony may be identified and accepted as an exhibit or copied into the record without reading, provided that copies thereof shall have been served upon all parties and the Commission ten days before the hearing or such prior service is waived.

69. (Rule 69) *Documentary Evidence.* If relevant and material matter offered in evidence is embraced in a document containing other matter, the party offering it shall designate specifically the matter so offered. If other matter in the document would unnecessarily encumber the record, the document will not be received in evidence, but at the discretion of the presiding officer, the relevant and material matter may be read into the record or copies thereof received as an exhibit. Other parties shall be afforded opportunity to examine the document, and to offer in evidence other portions thereof believed material and relevant.

70. (Rule 70) *Exhibits.* Exhibits shall be legible and either prepared on paper not exceeding 8½ x 13 inches in size, or bound or folded to that approxi-

mate size. Wherever practicable, the sheets of each exhibit should be numbered, and rate comparisons and other figures shall be set forth in tabular form. Copies of exhibits must be clear and permanently legible.

71. (Rule 71) *Copies.* When exhibits are offered in evidence, the original shall be furnished to the presiding officer and a copy to the reporter and to each party, unless the presiding officer directs otherwise.

72. (Rule 72) *Commission Records.* If any matter contained in a document on file as a public record with the Commission is offered in evidence, unless directed otherwise by the presiding officer, such document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of such document are specifically identified and are competent, relevant and material. If testimony in proceedings other than the one being heard is offered in evidence, a copy thereof shall be presented as an exhibit, unless otherwise ordered by the presiding officer.

73. (Rule 73) *Official Notice of Facts.* Official notice may be taken of such matters as may be judicially noticed by the courts of the State of California.

74. (Rule 74) *Additional Evidence.* At the hearing, the presiding officer may require the production of further evidence upon any issue. Upon agreement of the parties, he may authorize the filing of specific documentary evidence as a part of the record within a fixed time after submission, reserving exhibits numbers therefor.

Article 19. Decisions and Proposed Reports.

77. (Rule 77) *Issuance of Decisions.* A proceeding shall stand submitted for decision by the Commission after the taking of evidence, and the filing of such briefs or the presentation of such oral argument as may have been prescribed by the Commission or the presiding officer.

78. (Rule 78) *Petition for Proposed Report.* A party to a proceeding may file a petition requesting that a proposed report be issued by the presiding officer. Such petition shall be filed and called to the attention of the presiding officer before the conclusion of the hearing. The original and twelve copies of the petition shall be filed with the Commission, and the original shall show that copies have been served upon all parties to the proceeding. The petition shall set forth the reasons why it is believed that issuance of such a proposed report will promote the administration of justice and will not cause unreasonable delay in the final determination of the proceeding. Objections may be served an filed by other parties within five days after service of the petition.

79. (Rule 79) *Proposed Reports.* Upon direction by the Commission, the presiding officer shall prepare and file his proposed report. The Secretary's office shall cause copies thereof to be served upon all parties to the proceeding. Such proposed report shall contain recommended findings, conclusions, and order.

80. (Rule 80) *Exceptions.* A party may serve and file exceptions to a proposed report within twenty days after service thereof. Exceptions shall be specific,

and stated and numbered separately. Exceptions to factual findings shall specify the portions of the record relied upon; proposed substitute findings; and proposed additional findings, with supporting reasons. Exceptions to conclusions shall cite statutory provisions or principal authorities relied upon; proposed substitute conclusions; and proposed additional conclusions.

81. (Rule 81) *Replies to Exceptions.* Replies may be served and filed within fifteen days after service of exceptions.

82. (Rule 82) *Service of Orders.* Decisions and orders shall be served by the Secretary's office by mailing copies thereof to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a copy thereof. When a party to an application proceeding has appeared by a representative, service upon such representative shall be deemed to be service upon the party.

83. (Rule 83) *Effective Date.* Decisions and orders in complaint or investigation proceedings shall become effective twenty days after service thereof, unless otherwise provided therein. Decisions and orders in other proceedings shall become effective twenty days after issuance thereof, unless otherwise provided therein.

Article 20. Reopening Proceedings.

84. (Rule 84) *Petition to Set Aside Submission.* After conclusion of hearings, but before issuance of a decision, a party to the proceeding may serve on all other parties, and file with the Commission, a petition to set aside submission and reopen the proceeding for the taking of additional evidence. Such petition shall specify the facts claimed to constitute grounds in justification thereof, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. It shall contain a brief statement of proposed additional evidence, and explain why such evidence was not previously adduced.

Article 21. Rehearings.

85. (Rule 85) *Petitions for Rehearing.* Petitions for rehearing of an order or a decision shall be served upon all parties and should be filed before the effective date thereof, or, if the Commission has fixed a date earlier than the 10th day after issuance as the effective date of the order or decision, then before the 10th day after the date of issuance. (See P.U. Code, Sec. 1731.) Petitions shall set forth specifically the grounds on which petitioner considers the order to be unlawful or erroneous.

86. (Rule 86) *Effect of Filing.* Mere filing of a petition for rehearing shall not excuse compliance with a decision. A petition filed ten or more days before but not granted or denied before the effective date of an order suspends the order until the petition is granted or denied. (See P.U. Code, Sec. 1733.)

SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-92

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(PREVIOUSLY OCTOBER TERM, 1970, No. 1419)

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners,*

vs.

TRUCKING UNLIMITED, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-92

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vs.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (Jt.App. 46-59), together with the dissenting opinion of Circuit Judge Hamlin (Jt.App. 60, 61), is reported at 432 F.2d 755 (1970).[1]

[1]The appendix agreed to by petitioners and respondents and printed in a separate pamphlet is referred to herein as "Jt.App." The appendix at the end of this brief is referred to as "Attached Appendix."

The opinion of the District Court (Jt.App. 22-43) is reported at 1967 Trade Cas. ¶72,298 (N.D.Cal. 1967).

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1970 (Jt.App. 62). On December 22, 1970, by order of Mr. Justice Blackmun, the time within which to file a petition for a writ of certiorari was extended to February 18, 1971 (Jt.App. 63). On February 9, 1971, by order of Mr. Justice Douglas, the time within which to file a petition for a writ of certiorari was further extended to March 4, 1971 (Jt.App. 64). The petition was filed March 4, 1971, and was granted June 1, 1971. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The case arises on a motion, pursuant to Rule 12(b)(6) Fed.R.Civ.P., to dismiss the First Amended Complaint of Trucking Unlimited, et al., on the ground that such complaint fails to state a claim upon which relief can be granted. The following questions are presented:

1. Does an alleged agreement with anticompetitive motive by a group of certificated motor carriers, followed by the implementing and publicizing thereof, to carry out a jointly financed program of opposing, before the California Public Utilities Commission, the Interstate Commerce Commission,

and the appropriate federal or state courts, all applications, irrespective of their merits, for certificates of public convenience and necessity, or for the transfer or registration of certificates, constitute a violation of the antitrust laws where there is no allegation that defendants' efforts to influence the administrative bodies and courts were other than genuine, and no allegation that false or irrelevant evidence was ever presented, and no allegation that the administrative agencies and courts were ever lacking in, or prevented from exercising, full control over the extent to which they would allow protests and participation, and no allegation that the administrative agencies and courts were ever prevented from exercising full control over their determinations on the merits?.

2. Does not the *Noerr-Pennington* doctrine (*Eastern Railroad Presidents Conference v. Noerr,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965)), holding that Congress did not intend the Sherman Antitrust Act to apply to joint activities to influence governmental action, clearly extend to the alleged activities enumerated above?

3. Does not the *Noerr-Pennington* doctrine extend to such alleged activities even if the complaint be construed to allege that a primary purpose of defendants was to discourage and deter plaintiffs and others in like position from initiating or pursuing applications for certificates, or the transfer or registration thereof?

4. Would not a construction of the Sherman Antitrust Act to make unlawful the activities alleged in the First Amended Complaint infringe upon the constitutional right to petition provided for in the First Amendment?

CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

The appendix attached at the end of this brief sets forth the relevant provisions of (1) the United States Constitution, (2) the Sherman and Clayton Antitrust Acts, (3) the Interstate Commerce Act, (4) the Administrative Procedure Act, (5) the General Rules of Practice of the Interstate Commerce Commission, (6) the California Public Utilities Code, and (7) the Rules of Practice and Procedure of the California Public Utilities Commission.

STATEMENT

1. History of Action Below

A civil antitrust action was filed, pursuant to 15 U.S.C. §§15 and 26, on May 6, 1966 in the federal District Court for the Northern District of California, by 14 of the 15 trucking plaintiffs against the 19 trucking defendants, seeking treble damages and injunctive relief under the Sherman and Clayton Acts, 15 U.S.C. §§1-27.[2] The pertinent sections of those acts are set forth in the attached appendix of this brief, pp. i and ii.

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[2]The fifteenth plaintiff joined later.

All of the 15 plaintiffs allege in their complaint that they are highway carriers of property within California, operating under certificates or permits issued by the California Public Utilities Commission (PUC) for intrastate traffic, and under authorizations of the Interstate Commerce Commission (ICC) for interstate traffic. Similarly all of the 19 defendants are highway carriers operating in California under similar authority and jurisdiction of the California PUC and the ICC.

The complaint as originally filed on May 6, 1966 was the subject of several motions, including a motion to dismiss. Before a ruling thereon plaintiffs filed their First Amended Complaint (Jt.App. 1-18) on February 20, 1967. Defendants then filed a pleading consisting of (1) a motion to dismiss the First Amended Complaint on the ground that under the *Noerr-Pennington* doctrine plaintiffs had failed to state a claim upon which relief could be granted, and (2) a motion to dismiss or stay on the ground that the doctrine of primary jurisdiction required such dismissal or stay. (Jt.App. 19-21.)

Oral argument before Federal District Judge Swigert was confined to the first of these motions. He granted such motion by Memorandum of Decision dated October 5, 1967, (Jt.App. 22-43). In a letter to plaintiffs' counsel dated October 25, 1967 (Jt.App. 44, 45) the Judge made clear that his decision was limited to such first motion.

Judge Sweigert opined that since the pleading had already been amended once, plaintiffs had gone as far as they could "truthfully go toward alleging an antitrust violation", but he allowed them 15 days to file leave to

amend (Jt.App. 43). They declined, and instead appealed his ruling.

Oral argument in the Court of Appeals for the Ninth Circuit took place on October 13, 1969. One year later, on October 5, 1970 that Court issued its decision overruling Judge Sweigert by a 2 to 1 vote (Jt.App. 46-59). Senior Circuit Judge Hamlin agreed with Judge Sweigert and wrote a dissenting opinion in which he added a number of comments in support of the District Court's views (Jt.App. 60, 61).

2. Contents of First Amended Complaint

The First Amended Complaint (Jt.App. 1-18) mingles alleged facts with various condemning characterizations or conclusions. The alleged facts are as follows, with the characterizations and conclusions set forth in the footnote following:

> FACTS ALLEGED: Defendants since 1961 have conspired to weaken or put plaintiffs and others in like position out of business. To this end they have:
>
> 1. *Agreed* jointly to finance and to carry out and publicize a consistent, systematic and uninterrupted program of opposing "with or without probable cause and regardless of the merits" every application, with insignificant exceptions, for additional operating rights or for the registration or transfer of operating rights, before the California PUC, the ICC, and the courts on appeal.
>
> 2. *Carried out* such agreement (a) by appearing as protestants in all proceedings instituted by plaintiffs and others in like position or by instituting

complaints in opposition to applications or transfers or registrations; (b) by establishing a trust fund to finance the foregoing, consisting of contributions monthly in amounts proportionate to each defendant's annual gross income; (c) by publicizing and making known to plaintiffs and others in like position the foregoing program.

3. *Achieved* their agreed upon aims as follows: (a) depleted the resources of plaintiffs and others in like position; (b) delayed the ultimate granting of rights, transfers or authorizations; (c) caused the denial or restriction of rights since the application for such rights would otherwise have been granted "because no opposition would otherwise have been commenced"; (d) discouraged and deterred plaintiffs and others in like position from initiating or pursuing requests, applications or actions for rights, transfers, or registrations.[3]

---

[3]CHARACTERIZATIONS OF FACTS ALLEGED OR CONCLUSIONS: Plaintiffs declare in their First Amended Complaint that by means of the facts alleged defendants have practically and actually made unavailable, and have effectively closed to plaintiffs and others in like position, free and unlimited access to the machinery of the California PUC, the ICC, and the courts and have been able by their joint financing to make opposition which would not have been made but for such joint financing; have clogged and impeded such machinery; have abused such machinery; have denied to the California PUC, the ICC, and the courts the benefit of facts which plaintiffs might have presented had they not been discouraged or deterred; have harassed and obstructed plaintiffs and others in like position; have defeated, delayed, or restricted rights, transfers and registrations; have thwarted the policy of the PUC in liberally granting operative rights; have become the regulators of the rights, transfers and registrations in place of the PUC, the ICC, and the courts; have acquired and aggrandized their economic power and their monopoly power.

3. Reasoning of Federal District Court, per Judge Sweigert, In Granting Motion to Dismiss

In granting defendants' motion to dismiss, Judge Sweigert of the Federal District Court observed (Jt.App. 25) that the scope of the First Amended Complaint is expressly limited by its own language reading as follows (Jt.App. 4):

> "Plaintiffs, and other competitors of defendants who are joined herein or who are members of the designated class do not complain of any activities of defendants or their co-conspirators toward or in reference to any function of the ICC or PUC except as such activities pertain to the precise proceedings before those bodies."

He noted further that plaintiffs had stated in their brief before the federal District Court that "The misuse of judicial process constitutes plaintiffs' entire factual and legal case . . ." (Jt.App. 25).

Relying upon the *Noerr* and *Pennington* decisions of this court (*Eastern Railroad Presidents Conference v. Noerr,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965)), which hold that the Sherman Act was not intended by Congress to extend to joint appeals to governmental bodies, Judge Sweigert concluded that the First Amended Complaint failed to state a claim upon which relief could be granted, even assuming an overriding purpose to injure and destroy in ways unrelated to the actions of the regulatory bodies.

Judge Sweigert rejected the argument of plaintiffs that the *Noerr-Pennington* doctrine does not extend to activi-

ties conducted through the procedural machinery of the courts or of regulatory agencies like the California PUC or the ICC in which certain quasi-judicial functions are vested. He recognized that *Noerr* and *Pennington* speak in terms of the "legislative" and "executive" branches there involved, but he concluded that the rationale of those cases is equally applicable to activities directed to the courts or to regulatory agencies for the purpose of taking positions on points of fact or law pertinent to the regulatory acts. (Jt.App. 33). He observed that the right of access to courts and regulatory agencies is as much a political right as the right of access to the legislative and executive branches, that both the ICC and PUC Acts are framed in such a manner as to invite intervention by members of the regulated industry, and that such agencies encourage such intervention to provide them with pertinent information concerning public convenience and necessity without which these applications would be in effect one-sided proceedings. (Jt.App. 34.)

Judge Sweigert rejected the plaintiffs' argument that defendants' activity was "mere sham" and therefore within the dictum of *Noerr* that joint appeals to governmental bodies might fall outside the *Noerr* immunity if such appeals were "mere sham". He pointed out that the First Amended Complaint "carefully refrains from charging that the oppositions were false, misleading to the agency or lacking in factual allegation and legal theory arguably relevant to the function of the regulatory agency in determining public convenience and necessity." (Jt.App. 35.) He therefore concluded that the oppositions were not sham but genuine. (Jt.App. 36.)

Respecting the alleged deterrent effect upon plaintiffs and others in like position arising from defendants' activities, Judge Sweigert stated the gist of the allegations to be that the protests by defendants before the regulatory agencies and courts have had the effect of putting plaintiffs to the proof in support of their applications and thereby made it "exceedingly expensive" for plaintiffs and others to obtain certificates." (Jt.App. 37.) He concluded that such effect should not be held to take away the immunity of *Noerr*, in the following words:

> "Unfortunately, proceedings before courts or regulatory agencies, if opposed, entail expense in terms of time and money for both sides . . . this is inherent . . ." (Jt.App. 37.)

On the subject of bad motive he stated:

> "Whatever the law may be without *Noerr*, the Supreme Court has resolved the problem of bad purpose or intent *vis-a-vis* freedom of resort to public officials and agencies by holding that the latter is to be subserved notwithstanding the risk of tolerating an anti-competitive purpose of such resort and a possible anti-competitive result." (Jt.App. 36.)

4. Reasoning of Two-Member Majority of Court of Appeals

The Court of Appeals, per Circuit Judge Browning and designated District Judge Pregerson, reversed the District Court. To reach this result they construed the *Noerr-Pennington* immunity as not extending to "concerted employment of judicial and administrative processes" (Jt. App.47). They argued that the *Noerr-Pennington* immunity should not apply to "agreements to utilize judicial and administrative processes", as opposed to "joint ef-

forts to influence legislative and executive actions" because administrative agencies in considering applications for certificates of public convenience and necessity, and the courts in reviewing administrative action, do not have a need similar to that of the legislature or executive for information and opinion. (Jt.App. 49-50.) They argued that administrative bodies and reviewing courts are not engaged in determining whether laws should be adopted or enforced but merely in "adjudicating". The majority elaborated by saying in a footnote that judicial and administrative adjudicators "do not act in a representative capacity" and that "There is a marked difference between the processes by which they arrive at decisions, the materials upon which they may properly rely, and the atmosphere consistent with effective performance of their respective functions." (Jt.App. 52.)

The majority's alternative proposition was that even if they were wrong in limiting the *Noerr-Pennington* immunity as set forth above, the complaint alleges that defendants' real purpose was to restrain trade directly, rather than through the medium of governmental action, and that such purpose brings the complaint within the "sham" exception stated by way of dictum in *Noerr*. (Jt. App. 54-59.) The majority argued that the complaint in alleging an intent to deter plaintiffs and others in like position from seeking certificates alleges a purpose to preclude action by the governmental agencies and that in such situation the protests to the governmental agencies must be treated as "sham", however genuine and honest the efforts of defendants to support all protests as effectively as possible. (Jt.App. 58, 59.)

5. Reasoning of Dissenting Senior Circuit Judge Hamlin

Judge Hamlin agreed with the reasoning of Judge Sweigert of the District Court (Jt.App. 60, 61) and added supporting comments.

He observed that implementation of the broad statutory standard of "public convenience and necessity" is one akin to policy making, and that in exercising its judgment in implementing such statutory standard in an individual case the administrative agency is largely dependent upon information supplied not only by the applicant but competing carriers. Under these circumstances he would hold that the immunity of *Noerr-Pennington* should apply. (Jt.App. 60, 61.)

He would hold that any abuses flowing from the activities of defendants through their opposition to the grant or transfer of certificates should be dealt with by the agency which has power and ability to correct such abuses, rather than by invoking the Sherman Act.

SUMMARY OF ARGUMENT

The District Court and the dissenting Senior Circuit Court Judge correctly concluded that the allegations of the First Amended Complaint, if accepted as true, nevertheless fail to state a claim under the federal antitrust laws as construed by this Court in *Noerr* and *Pennington* (*Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)).

1. What the Complaint Alleges

The substance of the complaint is that defendant carriers, possessing certificates of public convenience and necessity from the California PUC and ICC, made an agreement to carry out and publicize a jointly financed program of opposing, before the PUC, the ICC, and the appropriate federal or state courts, every application, irrespective of its merits, for a certificate of public convenience and necessity, or for the transfer or registration of such a certificate; that defendants made such agreement and implemented and publicized it for the purpose of weakening or eliminating existing or potential competitors in the following ways: depleting their resources; delaying the granting or transfer or registration of certificates; causing the denial or restriction of certificates because such rights would otherwise have been granted "because no opposition would otherwise have been commenced"; discouraging or deterring such competitors from initiating or pursuing applications. (Jt.App. 1-18.)

2. What the Complaint Does Not Allege

There is no allegation that defendants' efforts to influence the PUC, the ICC and the courts have ever been other than genuine, and no allegation that false or irrelevant evidence has ever been presented. There is no allegation that the PUC or the ICC or the courts have at any time lacked, or been prevented from exercising, full control over the extent to which they would allow defendants to protest and participate. There is no allegation that the PUC or the ICC or the courts have at any time been prevented from exercising full control over their determinations on the merits. Finally, there is no allegation

that defendants agreed between themselves that if any one of them should seek additional certificated authority the others would refrain from protesting.[4]

3. The Rationale of Noerr and Pennington Precludes Sherman Act Liability

The language and the rationale of *Noerr* and *Pennington* require the conclusion that the Sherman Act does not extend to the facts alleged. In those cases this Court held that Congress did not intend the Sherman Antitrust Act to apply to joint activities to influence governmental action, even though inspired by anti-competitive motives and even though accompanied by a hoped-for or indeed known incidental effect that such activities would produce "direct injury" to competitors.

The reasons for such conclusion were given by the Court in *Noerr* as follows:

a. Essential dissimilarity

The Court said that joining together to attempt to persuade the legislature or the executive to take particular action with respect to a law is "essentially dissimilar" from the kind of combination Congress had in mind when it enacted the Sherman Act. Congress was legislating basically with respect to combinations which would amount to common-law trade restraints such as agreements to help one another take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts and market-division agreements.

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[4]In fact, several of the defendants have sought additional authority and have met with vigorous opposition from the others. E.g., Walkup's Merchants Express, PUC Application No. 47472 (1965); Pacific Motor Trucking Company, ICC Docket No. MC 78786 (Sub No. 268) (1967).

Noerr involved efforts by a group of railroads with anti-competitive intent to influence the legislature, the governor, and law enforcement officers to take certain restrictive action against truckers. The sole object was to hurt the truckers in every way possible, including the destruction of their goodwill. *Pennington* involved efforts with anti-competitive motive against small coal operators, by a union and major coal operators to persuade the Secretary of Labor to obtain establishment of high minimum wages for employees of contractors selling coal to the TVA, and efforts to persuade TVA officials to curtail spot market purchases. The facts alleged in the present case are essentially similar to those in *Noerr* and *Pennington*. They involved efforts, with anti-competitive motive, by one group of truckers against another, to persuade the ICC, the PUC and the reviewing courts to refuse to grant certificates or transfers thereof. The alleged intent was not only to influence the governmental officials but to discourage would-be applicants from filing or pursuing applications for certificates.

b. Need of Public Officials for Information

Noerr said the Sherman Act should not be extended to influence governmental officials vested with power to make determinations which would be in restraint of trade. While *Noerr* involved efforts to influence legislators and a governor, as well as law enforcing officers, *Pennington* applied the *Noerr* holding to efforts to influence the Secretary of Labor and the administrators of the Tennessee Valley Authority. An important reason given in *Noerr* was that public officials need to have the very kind of information and views which competitive interests can

furnish if such officials are to make determinations responsive to the public interest in the area of governmentally-imposed trade restraints. To extend the Sherman Act to efforts of competitors to influence those officials would dry up a valuable source of information.

In the present case, the ICC and PUC need to have the information and views of existing certificate holders in order to make determinations in the area of granting or withholding or transferring certificates of public convenience and necessity. The Ninth Circuit majority failed to take cognizance of the fact that the granting or denying of certificates of public convenience and necessity is not a mere fact finding function but requires the exercise of judgment within very broad boundaries, calling for the consideration of many factors, economic, political and social, and the development of policy within such boundaries. In this area in which public interest is the guide, the ICC and PUC must be receptive to the information and views of existing certificate holders if such bodies are to carry out their obligations in a manner fully responsive to the public interest.

The statutes governing the ICC and PUC, and the rules promulgated by those bodies, encourage existing certificate holders to participate in all certificate proceedings, subject to such procedural limitations as those bodies prescribe. The complaint recognizes that during the whole period covered by the complaint, covering several years, the information and views of defendants were indeed considered to have value by the ICC and PUC and did have an influence upon final determinations. There is no allegation that plaintiffs sought during any of the

period in question to have the ICC or PUC exclude the participation of defendants.

c. Existing Certificate Holders Occupy a Position of Public Trust

The holders of certificates of public convenience and necessity have assumed the obligations of a public utility and have public utility status. They may not pick and choose customers, but on the contrary must serve without discrimination; they may not change rates at will; they may not even go out of business at will. They have a continuing obligation to provide service under conditions acceptable to the Commission. Since they have an obligation to *maintain and perpetuate* their service in the public interest, they have a continuing concern, both for themselves and on behalf of the public, in the certificating process. Thus they have been given a recognized standing in all certificate proceedings. They represent not only their self-interest but the public interest as well and thereby occupy a position of public trust, even stronger than that of a "private attorney general." See *Seatrain Lines, Inc. v. United States,* 152 F.Supp. 619, aff'd 355 U.S. 181 (1957). It is not surprising that during all the period covered by the complaint their participation was allowed by the ICC and PUC, and that their views did influence the decisions of those bodies.

d. First Amendment Right to Assemble and Petition May Not Be Infringed

In addition to the reasons of "essential dissimilarity" and the need of governmental officials to have the information and views of those with anti-competitive interest, another reason given in *Noerr* for holding that the

Sherman Act should not be extended to joint efforts to influence public officials was that otherwise a serious question of infringement of First Amendment rights would arise. With this in mind the Court invoked the principle of statutory construction that Congress is presumed to have chosen to avoid constitutional dangers. Thus, the Court did not have to decide the constitutional question, although it strongly suggested that a contrary interpretation of the Sherman Act would infringe First Amendment rights. As in *Noerr*, so here the presence of the constitutional issue together with other factors is enough to decide that the Sherman Act does not apply.

If the constitutional issue were reached, defendants contend that infringement would indeed result. The alleged participation of defendants in all certificate proceedings was a form of political expression protected by the First Amendment. Such participation was a means of seeking to achieve governmental determinations, based upon public interest, that additional certification would run contrary to public convenience and necessity. Such participation was not for the resolution of private differences, since there is no such thing as a right to receive a certificate, nor is there such a thing as a right by existing certificate holders to keep others from receiving certificates. The activities of defendants fall within the reasoning of this Court in *NAACP v. Button*, 371 U.S. 415 (1963) and subsequent cases.

There is no justification for the Ninth Circuit majority's conclusion that in applying a balancing test, First Amendment protection in the instant case must give way to the antitrust policies of the United States.

The Ninth Circuit failed to recognize that certificate proceedings deal exclusively with an issue of *public interest* in which defendants have a special concern because of their public utility obligation. Any restraint of trade is the result of governmental action imposed in the public interest.

The Ninth Circuit would draw an indistinct line between "probable case" and lack thereof, as a basis for determining whether the Sherman Act applies to joint protests of defendants in certificate proceedings. Aside from the fact that the concept of "probable cause" has no proper application in certificate proceedings, concerned as they are with public interest determinations rather than the resolution of private rights, the absence of a clear, bright line between lawful and unlawful participation would produce a chilling effect upon the exercise of First Amendment rights. That is enough to condemn the Ninth Circuit's interpretation and make the Sherman Act, as thus applied, unconstitutional.

e. The Alleged Facts Do Not Fall Within the "Sham Exception" of Noerr

Noerr suggests in a dictum that "there may be situations in which a publicity campaign, ostensibly directed toward governmental action, is a mere sham to cover what is nothing more than an attempt to interfere directly with business relationships . . .". 365 U.S. at 144. The Court made clear that if the efforts to influence governmental officials are genuine in the sense that there is an intent to influence such officials, it is immaterial that there may be an additional intent to destroy the goodwill of the

competitor. *Pennington* expressly states that *Noerr* shields from the Sherman Act concerted effort to influence public officials "regardless of intent or purpose". 381 U.S. at 670.

In the present case the complaint concedes that there was a genuine intent to influence the ICC and PUC and the reviewing courts in making their determinations in certificate matters. Thus the fact that the complaint can be interpreted to allege an additional intent, viz., to discourage and deter would-be applicants from seeking certificates, is irrelevant.

The Ninth Circuit majority rejected the sham exception of *Noerr*, and created one of its own, under which a multiplicity of intents must be weighed. The Ninth Circuit conceded that the alleged intent to influence the ICC and PUC was genuine, but it construed the complaint to allege that the other alleged intent, viz., to discourage would-be applicants from seeking certificates, was "primary" and therefore rendered the first intent "sham", thus bringing defendants' activities under the Sherman Act.

Defendants point out that such Ninth Circuit majority's sham exception would have the same infirmities as its main holding. It would dry up the furnishing of information needed by governmental officials, and it would infringe First Amendment rights. Once again there would be no clear, bright line providing a guide between Sherman Act violation and lawful joint approaches to governmental bodies. The test would be to determine which intent is "primary", an esoteric speculation that even the persons making such joint approaches would find it difficult to

weigh. A chilling effect upon the exercise of First Amendment rights would be inevitable.

f. The Rule of Reason in Construing the Sherman Act Requires Exemption From Its Terms Upon the Facts Alleged

The Sherman Act should not be stretched to cover every alleged abuse. The rule of reason which has long been applied in construing the boundaries of the Act dictates that the alleged abuses can best be left to the good judgment and effective disposition of the ICC and PUC. Those bodies have full power over their procedures and comprehensive substantive regulation of certificated carriers. Their decisions in certificate matters fall under the principle that where a restraint is the result of valid governmental action, as opposed to private action, there is no Sherman Act violation. Their decisions are made with independence of judgment. *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939); *Parker v. Brown*, 317 U.S. 341 (1943).

Since agency supervision of the alleged anti-competitive conduct is so complete, there is no justification for stretching the antitrust laws to apply.

g. Review of Lower Court Authorities

A summary is set forth reviewing the more significant decisions since *Noerr*. None of them has limited the *Noerr-Pennington* immunity in the way suggested by the Ninth Circuit. One of them, *Association of Western Railroads v. Riss*, 299 F.2d 133 (C.A.D.C. 1962) held that *Noerr-Pennington* shields applications to the ICC with respect to its function of certificating interstate carriers.

h. Conclusion

For all of the reasons set forth above the decision of the Ninth Circuit should be reversed and the complaint dismissed.

ARGUMENT

Each of the reasons given by the Court in *Noerr* and *Pennington,* for holding that the Sherman Act does not extend to joint efforts with anti-competitive motive, to influence governmental officials, applies with at least equal force to the facts alleged in the complaint. Those reasons, which are considered in detail below, are that: (1) such activities are "essentially dissimilar" from the trade-restraint activities intended to be covered by Congress; (2) extension of the Sherman Act to forbid joint efforts to influence governmental officials would dry up a source of information which governmental officials need if they are to exercise their authority in an adequately informed manner; and (3) extension of the Sherman Act to forbid joint efforts to influence governmental officials would raise the question of infringing the First Amendment right to assemble and petition. The Court expounded further in *Noerr* as follows:

(4) Since motive is irrelevant to the conclusion, the Sherman Act does not apply even if the *sole* purpose, in seeking to influence governmental action, is to destroy the competition. Thus, if the present complaint is construed to allege a sole purpose to destroy plaintiff truckers and others in like position, that allegation is not effective to change the conclusion that the Sherman Act is inapplicable.

(5) Similarly the Court in *Noerr* stated that its conclusion would not be altered by the presence of an intent to do more than merely seek to influence governmental action, viz., an intent to destroy the competition through the destruction of its goodwill even though no legislation was secured; such infliction of direct competitive harm would be an expected, and indeed intended, indirect result of efforts to influence governmental officials. The allegation in the present complaint that the defendants intended to do more than merely seek to influence governmental action, viz., to deter would-be applicants from seeking certificates, falls in the same category; such deterrence would be an allegedly expected and intended indirect result of efforts to influence governmental officials, and *Noerr* immunity should not be affected.

(6) Finally the Court in *Noerr* stated that the use of deceptive methods in seeking to influence governmental officials would not change the result since the Sherman Act is not concerned with ethics as such. In the present case that issue does not arise at all since there is no allegation or suggestion that the efforts to influence governmental bodies were other than honest.

(7) After reaching its conclusion of Sherman Act immunity the Court in *Noerr* went on to say by way of dictum that "there may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relations of a competitor and the application of the Sherman Act would be justified". 365 U.S. at

144. It will be shown that such "sham" exception has no proper application to the acts alleged in the complaint.

Each of the foregoing seven items is discussed below along with additional considerations leading to the conclusion that no Sherman Act violation is alleged by the present complaint.

I. ESSENTIAL DISSIMILARITY: THE ACTS ALLEGED ARE "ESSENTIALLY DISSIMILAR" FROM THOSE INTENDED TO BE COVERED BY THE SHERMAN ACT

In *Noerr* the joint activity of the defending railroads consisted of hiring a public relations firm to conduct a publicity campaign against plaintiff truckers. The campaign was designed to foster adoption and retention of laws and law enforcement practices destructive of the trucking business. It included efforts to influence the legislature to adopt or retain certain laws and to influence the governor to veto unfavorable legislation. It also included efforts to persuade law enforcement agencies to enforce certain existing laws more rigidly.

Upon these facts this Court reversed the court below and held that the Sherman Act did not extend to such "associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly". 365 U.S. at 136.

The first reason given in *Noerr* for holding such "political activities" outside the Sherman Act was their "essential dissimilarity" from the agreements traditionally condemned by Section 1 of the Sherman Act, viz., common

law trade restraints—combinations ordinarily characterized by an agreement of the participants to give up their trade freedom or help one another take trade freedom from others through such devices as price-fixing agreements, boycotts, market-division agreements and the like. 365 U.S. at 136."

In *Pennington* the alleged joint activities of the defending union and major coal operators consisted of an agreement to take various steps to exclude the marketing, production, and sale of non-union coal. The agreement included a joint approach to the Secretary of Labor to persuade him to obtain establishment under the Walsh-Healy Act of a minimum wage for employees of contractors selling coal to the TVA which would make it difficult for small companies to compete in the TVA "term contract" market; it also included a joint urging of TVA officials to curtail spot market purchases, a substantial portion of which were exempt from the Walsh-Healy order.

A verdict for antitrust violation was given, and was sustained by the Court of Appeals. This Court reversed, holding that neither the trial court nor the Court of Appeals had taken proper account of the *Noerr* case. This Court, per Mr. Justice White, said (381 U.S. at 670):

> "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."

The *Pennington* case establishes that the sweep of the *Noerr* exclusion extends beyond the "political activity" of seeking to secure or defeat legislation through appeals to the legislature and the governor and includes "concerted efforts to influence public officials", specifically attempts to persuade governmental executive officials and administrative agencies to take certain action which would have an anti-competitive effect. As in *Noerr* there is "essential dissimilarity" from common-law trade restraint activity.

The present complaint, like *Pennington,* involves alleged efforts to influence public officials to take certain action within the bounds of their discretionary authority which would have an anti-competitive effect, such officials being the members of two administrative agencies regulating public utilities, viz., the ICC and the PUC, and the courts reviewing the work of those agencies.

The alleged activities in the present complaint must be deemed "essentially dissimilar" from the activities intended to be condemned by the Sherman Act since they are truly "essentially" *similar* to the activities considered by this Court in the *Noerr* and *Pennington* cases. The activities alleged are simply concerted applications to public officials vested with power to take trade-restrictive action. This essential similarity will become more apparent from the material which follows elucidating the certificating functions of the ICC and PUC.

In *Noerr* this Court said that even if the element of "essential dissimilarity" is not of itself conclusive on the question of the scope of the Sherman Act, it is conclusive if "considered along with the other difficulties that

would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws". 365 U.S. at 137. The first of these difficulties relates to the need of governmental officials for information and is discussed in the following section. The other difficulty, involving First Amendment rights, is discussed thereafter.

II. NEED OF PUBLIC OFFICIALS FOR INFORMATION FURNISHED BY ANTI-COMPETITIVE INTERESTS: EXTENSION OF THE SHERMAN ACT TO FORBID JOINT EFFORTS TO INFLUENCE GOVERNMENTAL OFFICIALS WOULD DRY UP A SOURCE OF INFORMATION WHICH SUCH OFFICIALS NEED IF THEY ARE TO EXERCISE THEIR AUTHORITY IN AN ADEQUATELY INFORMED MANNER

This Court in *Noerr* stated that inclusion in the Sherman Act of joint solicitation of governmental action with respect to the passage or enforcement of laws:

> ". . . would substantially impair the power of government *to take actions* through its legislature and executive *that operate to restrain trade.*" (Emphasis added.) 365 U.S. at 137.

This "substantial impairment" was considered an important and significant factor in construing the intended scope of the Sherman Act. *Noerr* speaks in terms of influencing the legislature and the governor because those were the entities there involved. But *Pennington* makes clear that the rationale of *Noerr* extends as well to the influencing of other public officials, including administrative agencies, with power to take restrictive action in the public interest.

The concept is that in making determinations involving judgment based upon a variety of factors, governmental officials should not be precluded from receiving useful information contributing to their expertise in making decisions responsive to the public interest, and that persons with competitive motive are often the very ones whose information and opinions can be most useful to a proper decision. Their competitive activity places them in a position of having special knowledge, and their motivation to come forward is strong. The advantage to government of having this source of information available outweighs antitrust considerations.

This is the point at which the Ninth Circuit majority adopted a narrow interpretation of *Noerr-Pennington* and drew distinctions which, defendants submit, are not justified by the rationale of those cases.

First the Ninth Circuit seemingly adopted the view that the doctrine of *Noerr-Pennington* applies only to elected officials. (Jt.App. 51, 52, footnote 6.) In the light of *Pennington* there is no valid basis for such conclusion. *Pennington* involved appeals to the Secretary of Labor and the TVA. Contrary to the statement in the above footnote, not only elected but appointed officials can act "in a representative capacity", as in those instances where they are called upon to make discretionary determinations in the public interest.

Next the Ninth Circuit majority undertook to narrow *Noerr-Pennington* by saying that Sherman Act immunity applies only when the public officials, sought to be influenced, are vested with authority to determine (a) whether laws restraining trade will be adopted, or (b)

whether such laws having been adopted will be enforced. (Jt.App. 49, 50.) There appears to be no rational basis for such a limitation. It is not only officials such as legislators empowered to determine whether laws restraining trade should be adopted, or executives empowered to determine whether such laws being adopted should be enforced, but appointed officials charged with the duty to determine the way in which such laws should be implemented, who benefit from the information and views of those having a competitive interest. They benefit in the sense that they can with greater certitude make decisions which are responsive to each element within their proper sphere of consideration.

Next the Ninth Circuit undertook to narrow the *Noerr-Pennington* immunity by saying that the work of the ICC and PUC in certificate matters is simply "adjudication" and that the information and opinions which defendants can furnish are not relevant to the determinations of such governmental bodies. (Jt.App. 49, 50.) Defendants submit that regardless of whether the certificating function be designated "adjudication" or by some other name, it is serious error to conclude that the information and views of existing certificate holders are irrelevant to the determinations made by the ICC and PUC. The Ninth Circuit simply failed to take cognizance of the broad discretionary aspect of the certificating function which makes such information and views highly relevant. If those governmental officials charged with administration of the certificating function were denied such information and views, they would be substantially impaired in reaching decisions responsive to all elements

within their proper sphere of consideration. Therefore, the Sherman Act should not be extended to include the joint efforts described in the complaint.

The subsection which follows describes the nature of the certificating function and the great breadth of considerations relevant to determinations within the language "public convenience and necessity".

A. The Granting or Denying of Certificates of Public Convenience and Necessity Requires the Exercise of Judgment Within Very Broad Boundaries, Calling for Consideration of Many Factors, Economic, Political and Social, and the Development of Policy Within Such Boundaries.

The term "public convenience and necessity" does not connote an absolute which can be determined simply by marshaling and applying facts, as the Ninth Circuit majority suggests (Jt.App. 50, footnote 4). On the contrary, as subsequent citations will show, the term is purposefully broad and was used by Congress to enable the ICC, and was used by the California legislature to enable the PUC, to make determinations in the public interest as of any given time in the light of the whole spectrum of economic, political and social conditions then prevailing. *Public interest* has been described as the unbroken thread which must guide the commission in making each determination. *San Diego & Coronado Ferry Co. v. Railroad Commission,* 210 Cal. 504, 509, 292 P. 640, 641, 642 (1930).

Despite the above considerations the Ninth Circuit majority characterized the work of the ICC and PUC as "adjudicative". (Jt.App. 50, footnote 4.) It noted the Administrative Procedure Act provisions relating to li-

censing, and it said that the PUC is concerned with facts—"experience, financial ability, available equipment". (Jt.App. 50, footnote 4.) No mention was made of the broad economic, political and social aspects which the Commission must take into consideration.

While "adjudicative" may be the correct word to describe the fact that the ICC and PUC observe *procedures* which are similar to those of courts, and to describe the fact that an order or opinion is rendered, such adjective should not be used to divert attention from the essential nature of the *substantive* aspect of the commission's function.

In a real sense a commission charged with the issuance of certificates of public convenience and necessity is performing a legislative function delegated by the legislature within a very broad framework permitting of wide discretion and requiring agency determination of policy. The Commission does in fact make policy on a case-by-case basis,[5] although it may also determine policy in a general rule-making proceeding. The dissenting Senior Judge Hamlin of the Ninth Circuit correctly stated that "the activity of the Public Utilities Commission in the implementation of the broad statutory standard is one akin to policy making". (Jt.App. 60.)

The broad discretion lodged in the PUC and ICC is particularly significant in the motor carrier field because the nature of the operation permits of wide differences of view respecting the extent of competition required by the public interest. Whereas certification of a telephone or

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[5]For example, see *Walkup's Merchants Express*, 66 Cal. PUC 578 (1966); *Peninsula Motor Express*, 49 Cal. PUC 807 (1950).

a gas or an electric utility normally presupposes that public convenience and necessity requires a complete monopoly in a given area, thus limiting the enquiry mainly to a determination whether the applicant is fit, willing and able (or if several applicants are competing for the same area determining which of them is the most fit, willing and able), certification of motor carriers may range, as determined by the public interest, all the way from complete monopoly to almost unlimited competition. The constantly recurring problem for the PUC and ICC, arising with each application, is to determine how extensive the competition should be in the area under consideration, in the light of economic, political and social conditions then prevailing. Neither the ICC nor the PUC has ever attempted to state how much or how little competition it deems to be in the public interest in a given location at a given time although there have been PUC general policy decisions from time to time stating that because of the conditions then prevailing the commission would look with favor upon certificate applications for a short period and then revert to a more restrictive attitude.[6] By and large, however, each commission has determined the degree of liberality or restrictiveness on a continuing, *ad hoc*, basis with each application.

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[6]In *Investigation of Carriers of Property*, 48 Cal. PUC 62 (1948), supplemented by 48 Cal. PUC 587 (1949) the PUC indicated it would look with favor upon certificate applications by those carriers holding permit rights but probably operating beyond their permit authority, the thought being that by such liberal attitude a difficult enforcement problem would be overcome and a more effective regulation achieved. See Lakusta, *Regulation of Truckers for Hire in California*, 41 Calif.L.Rev. 63, 79-82 (1953). The policy failed and several years later the PUC in *Investigation of Regulation of Carriers of Property*, 53 Cal. PUC 366 (1954) announced that it would look with favor upon certificate

The complaint alleges that prior to the commencement of consistent protesting by defendants in 1961 the PUC granted certificates and transfers of certificates "liberally". (Jt.App. 11.) It then alleges that defendants sought to "thwart the policy and aims of the PUC in liberally granting operating rights". (Jt.App. 12.) Such allegation makes the assumption which is legally unsound that a liberal policy once adopted may not be questioned, and the agency itself may not change it. The fact is that the PUC has a continuing legal duty to consider all relevant factors in each case and to alter policy as public interest dictates. While the complaint falls short of alleging a *right* on the part of plaintiffs to a continued liberal policy by the PUC, the Ninth Circuit takes the implication of such a right and treats it as an alleged right bearing upon the issue whether defendants' alleged protests were valid. (Jt.App. 56.)

In the same vein the Ninth Circuit majority refers to the complaint's allegation respecting registration of certificates and states that the allegation in substance is: "Until 1963 it was the policy of the ICC to register any certificate issued by the PUC automatically, without further hearing." (Jt.App. 56.) The implication is that defendants sought to change a firm policy, in the nature of a right, and that the validity of defendants' protests is therefore called in question. Once again the Ninth Circuit

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applications *filed within 90 days* of the decision by those carriers then holding permitted rights but concerned lest they were operating beyond their permitted authority. See Poe, *Regulation of Highway Carriers in California*, 30 So.Calif.L.Rev. 131, 143-146 (1957). The implication was that after the period of grace the Commission would revert to a more restrictive view of public convenience and necessity.

majority relies upon a legally unsound premise. Indeed there never was an ICC policy respecting the registration of PUC rights to obtain commensurate ICC rights. An examination of the Interstate Commerce Act would reveal that the change in registration practices was not because of a change in policy or of anything defendants did to change a policy but because of the October 15, 1962 amendment to the Interstate Commerce Act which *abolished* the right of automatic registration and required a finding henceforth of public convenience and necessity respecting the inter as well as intrastate portion of a proposed certificate before it could be registered. The statutory provision, as amended, 49 U.S.C. §306(a)(6), is reproduced on pages vii and viii of the Attached Appendix.

We turn to selected cases, out of the great number of available decisions, describing the nature of the certificating function. Such cases establish the correctness of the comments made hereinabove.

B. The ICC and PUC Are Vested With Broad Discretionary Authority to Determine the Proper Administration of a Legislative Scheme Involving Restraints of Trade.

1. Certification By the Interstate Commerce Commission.[7]

In *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 65 (1945) this Court stated:

> "Public convenience and necessity is not defined by the statute [Interstate Commerce Act]. The nouns in the phrase possess connotations which have evolved from the half-century experience of government in the regulation of transportation. When Congress in 1935 amended the Interstate Commerce Act by adding

[7]The relevant statutory provisions are set forth in the Attached Appendix, pp. iii-x.

> the Motor Carrier Act, it chose the same words to state the condition for new motor lines which had been employed for similar purposes for railroads in the same act since the Transportation Act of 1920 . . . Such use indicated a continuation of the administrative and judicial interpretation of the language. . . . The Commission had assumed, as its duty under these earlier subsections, the finding of facts and the *exercise of its judgment* to determine public convenience and necessity. This Court approved this construction. . . . The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. . . . This, of course, gives *administrative discretion* to the Commission . . . *to draw its conclusion from the infinite variety of circumstances which may occur in specific instances.*" (Emphasis added.)

This Court used similar language a short time later in *United States v. Detroit and Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945), per Mr. Justice Douglas, as follows:

> "The Commission is the *guardian of the public interest* in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted *with a wide range of discretionary authority.* Interstate Commerce Commission v. Parker, 326 U.S. 60, 89 L.Ed. 2051, 65 S.Ct. 1490. Its function is not only to appraise the facts and to draw inferences from them *but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies.*" (Emphasis added.)

These two cases were preceded 5 years earlier by *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U.S. 134 (1940) in which the similar phrase "public convenience, interest, or necessity" was involved. Justice Frankfurter wrote (309 U.S. at 137, 138):

> "In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the *complicated factors for judgment* in such a *field of delegated authority* permit, it serves as *a supple instrument for the exercise of discretion* by the expert body which Congress has charged to carry out its legislative policy." (Emphasis added.)

Lower federal courts have followed the above decisions.[8]

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[8]Reference may be made particularly to the following: *Delaware Coach Co. v. Delaware Public Service Commission*, 265 F. Supp. 648 (D. Del. 1967); *Indianhead Truck Line, Inc. v. United States*, 253 F.Supp. 186 (D. Minn. 1966), Blackmun, J., participating; *Youngblood Truck Lines, Inc. v. United States*, 221 F.Supp. 809 (W.D. N.C. 1963); *Worster Motor Lines, Inc. v. United States*, 226 F.Supp. 603 (W.D. Pa. 1963); *North American Van Lines Inc. v. United States*, 217 F.Supp. 837 (N.D. Ind. 1963); *Burlington Truck Lines Inc. v. Interstate Commerce Commission*, 194 F.Supp. 31 (S.D. Ill. 1961) reversed on other grounds, 371 U.S. 156, 83 S.Ct. 239, 9 L.Ed. 207 (1962); *Virginia State Lines v. United States*, 48 F.Supp. 79 (W.D. Va. 1942). In the *Delaware Coach Co.* case cited above, the court said (265 F.Supp. at 652, 653):

> "The term 'public convenience and necessity' has long been recognized as a term of art, the application of which involves the exercise of administrative discretion. For this reason courts have invariably held, when confronted with the issue, that *the granting or withholding of certification to a public utility is a legislative function.*" (Emphasis added.)

The fact that the regulatory commission is not bound to a policy once determined but, on the contrary, has the obligation to alter the policy if public interest indicates, is expressed in the *Youngblood* case, *supra,* as follows (221 F.Supp. at 818):

> "The Interstate Commerce Commission, in the exercise of its administrative authority and discretionary judgment, not only can promulgate standards for determining public convenience and necessity, but *is free to alter its policies and standards when the necessity, in its judgment, arises.*" (Emphasis added.)

Similarly in the *Worster Motor Lines* case, *supra,* the court said (226 F.Supp. at 608):

> "It must not be overlooked that the Interstate Commerce Commission under the law acts on a finding of public convenience and necessity. This necessarily implies that the necessity of the public *may change from time to time.* The Commission, therefore, is not ruled by res judicata as that term is used by courts as a rule of precedence . . .' . . . an administrative agency *is not bound by its own prior determinations,* though the courts may take these prior determinations into consideration.' State Airlines, Inc. v. Civil Aeronautics Board, 84 U.S.App.D.C. 374, 174 F.2d 510, 518 (1949)." (Emphasis added.)

To somewhat similar effect is the language in *Virginia State Lines, supra,* (48 F.Supp. at 83):

> ". . . the regulation of transportation involves various economic factors and the exercise of an empirical judgment, since '*The stuff of the process is fluid and changing*—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy

> to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems'. Board of Trade of Kansas City v. United States, 1942, 314 U.S. 534, 546, 62 S.Ct. 366, 372, 86 L.Ed. 432." (Emphasis added.)

The very broad range and freedom of the Commission in exercising its discretion in the certificating process is noted in the following language in the *Burlington Truck Lines* case, *supra*, (194 F.Supp. at 48):

> "The courts, in numerous decisions, have held that the commission has a broad discretion in determining the issue of public convenience and necessity under Section 207(a) of the Interstate Commerce Act . . . This issue is a matter requiring the exercise of the commission's expert judgment in the field of transportation. . . . In the exercise of this administrative function *there are no specifications of consideration by which the Commission is to be governed* in determining whether or not public convenience and necessity requires the inauguration of motor carrier service." (Emphasis added.)

2. Certification by the California Public Utilities Commission.[9]

Turning to California the decisions are equally clear in stating the principles delineated above. In *Sale v. Railroad Commission*, 15 Cal.2d 612, 104 P.2d 38 (1940), the California Supreme Court described the California PUC and its functions in the following terms (15 Cal. 2d at 617, 618, 104 P.2d at 41):

> ". . . Created by the Constitution in 1911, the commission was designed to protect the people of the

[9]The relevant statutory provisions are set forth in the Attached Appendix, pp. xix-xxiv.

> state from the consequences of destructive competition and monopoly in the public service industries. . . . Although it has been termed a 'quasi-judicial' tribunal in some of its functions, its powers and duties go beyond those exercised by the judicial arm of government. . . . A court is a passive forum for adjusting disputes, and has no power either to investigate facts or to initiate proceedings. Litigants themselves largely determine the scope of the inquiry and the data upon which the judicial judgment is based.
>
> "The powers and functions of the railroad commission are vastly different in character. *It is an active instrument of government charged with the duty of supervising and regulating public utility services* and rates. . . . The Constitution gives the legislature full authority to implement the commission's powers with legislation germane to public utility regulation, and under this authority the legislature has departed from traditional techniques of judicial procedure. The commission has the *right and duty* to make its own investigations of fact, to initiate its own proceedings and in a large measure *to control the scope and method of its inquiries.*" (Emphasis added.)

This language sets forth in clear terms the fact that the commission has an obligation going beyond the passive function of determining rights in cases presented to it. Its substantive activity, at least so far as the granting or denying of certificates is concerned, is more akin to the legislative than the judicial function. As the California Supreme Court said in *California Motor Transport Co. v. Railroad Commission,* 30 Cal.2d 184, 187, 180 P.2d 912, 914 (1947):

> "The power granted to the commission in issuing certificates of public convenience and necessity is very broad".

There is language to similar effect in *Southern California Edison Co. v. Railroad Commission,* 6 Cal.2d 737, 748, 59 P.2d 808, 813 (1936):

> "There is another field of *extensive scope* in which the respondent commission exercises its powers . . . In this field are the executive and administrative orders of the commission in connection with which the commission exercises a wide discretionary power, such as in the granting, withholding, and cancelling of permits [certificates] . . ." (Emphasis added.)

See also *San Diego & Coronado Ferry Co. v. Railroad Commission,* 210 Cal. 504, 511, 512, 292 P. 640, 643 (1930).

While the labelling of the certificating function should be accorded little significance in itself[10] the very broad discretionary authority delegated to the PUC by the legislature's use of the term public convenience and necessity no doubt led to the comment by the former chief counsel of the PUC that the certificating function is legislative in nature. Everett C. McKeage, PUBLIC UTILITY REGULATORY LAW, 107 (1956).

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[10]Judge Friendly commented as follows in his article, *"The Federal Administrative Agencies: The Need For Better Definition of Standards"*, 75 Harv.L.Rev. 863, 869 (1962):

> "Although I call the process of applying such standard [e.g., public convenience and necessity], . . . 'administrative adjudication', I have no intention of indulging in the sport, once so popular, of attempting to determine how far such action is judicial or legislative or executive, even 'softened with a *quasi*'. My litmus paper is not sensitive enough for me to do the job."

The next section deals with the need of governmental officials exercising the certificating function for the kind of information which existing certificate holders can and are motivated to furnish.

C. The Information And Views Of Existing Certificated Carriers Do Have Significant Value To The Public Officials Charged With The Certificating Function.

1. The Interstate Commerce Act and the California Public Utilities Code as well as the rules of the respective commissions encourage intervention by existing certificate holders.

Once it is recognized that the certificating function is not merely a fact finding activity but requires a delving into the infinite variety of circumstances, economic, political and social, which should be weighed in applying the test of public convenience and necessity if the regulatory body is to carry out its obligation of being "the guardian of the public interest" (as Mr. Justice Douglas put it in the *Detroit and Cleveland Navigation* case quoted on page 35 above), it becomes apparent that the public officials charged with the certificating function can derive information and views from existing carriers which will be of value in the crucible of relevant considerations. Failure to receive such information and views, under suitable procedural control of the agency, would amount to disregard of the obligation of governmental officials in a representative, democratic society.

Perhaps the most telling proof that the information and views of existing certificated carriers should be held to have value to the ICC and PUC in their respective deliberations, is that the relevant statutes contemplate intervention by existing certificate holders, and that the two

commissions have adopted rules under which such intervention may be made.[11]

The Interstate Commerce Act in 49 U.S.C. §304 obligates the ICC "to regulate common carriers by motor vehicle" and authorizes the establishment of requirements to achieve "continuous and adequate service", and authorizes the ICC to "obtain from such carriers . . . such information as the Commission deems necessary". The Act provides, in connection with applications for, or transfers of. certificates, that (§305(e)) "In accordance with rules prescribed by the commission, reasonable notice shall be afforded . . . to interested parties" and such section further provides that "opportunity for intervention . . . for the purpose of *making representations to the* commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties." There is a similar provision in §306 relating to the special situations in which Congress has delegated to state commissions the right to determine public convenience and necessity for interstate operations occurring geographically wholly within one state.

The rules promulgated by the ICC implement the statutory provisions. Under the Special Rules for Applications for Certificates of Public Convenience and Necessity (Rule 247, recited on pages xvii-xix of the Attached Appendix), there is provision for notice in the Federal

[11]The pertinent statutory provisions of the Interstate Commerce Act are set forth in the Attached Appendix, pages iii-x. The pertinent rules promulgated by the ICC are set forth on pages x-xix of such Appendix. The pertinent statutory provisions of the California Public Utilities Code are set forth on pages xix-xxiv, and the pertinent rules of the PUC, on pages xxiv-xxvii of such Appendix.

Register of the filing of the application, and there is a provision for the filing of protest. It is obvious that the Rules contemplate protests by existing certificate holders. Thus it is provided in Rule 247(d)(3) that:

> "A protest against any application shall set forth specifically grounds upon which it is made and contain a detailed statement of the protestant's interest in the proceeding (*including a copy of the specific portions of its authority which protestant believes to be in conflict with that sought in the application,* and describing in detail the method (whether by joinder, interline, or other means) by which protestant would use such authority to provide all or part of the service proposed), shall request an oral hearing if one is desired, and shall specify with particularity the facts, matters, and things relied upon . . ." (Emphasis added.)

The tenor of Rule 247(d)(5) also shows that the ICC contemplates intervention by existing certificate holders.

Turning to the situation in California the California Public Utilities Code in §701 gives the PUC broad regulatory power over every public utility, including every certificated carrier. More specific terms to the same effect are set forth in §1062. §1069 provides that every application for a certificate shall be accompanied by proof of service upon such interested parties as the commission requires.

In implementation of the pertinent provisions, which appear at pages xix-xxi of the Attached Appendix, the PUC's Rules of Practice and Procedure contain a number of provisions demonstrating that the PUC considers the intervention of existing certificate holders to be relevant.

Thus Rule 21 requires that applications for certificates contain "the names of all common carriers with which the proposed service is likely to compete, and a certification that a copy of the application has been served upon or mailed to each such carrier named". There is a similar provision in Rule 37 relating to transfer applications. Rule 54 provides for the entering of an appearance and participation, to the degree permitted by the presiding officer, by anyone making a full disclosure and stating fairly the extent of interest and the position intended to be taken so long as the "contentions will be reasonably pertinent" to the issues raised by the application.

In both the ICC and PUC practice there are provisions establishing the right of anyone who has intervened and participated in a commission proceeding to seek review by way of rehearing, and also by court review. (Attached Appendix, pp. xii-xvi; xxii-xxiv.)

Defendants submit that Judge Sweigert of the District Court below correctly summarized the situation when he said (Jt.App. 34):

> "Both the ICC and PUC Acts, involved in the pending case, are framed in such manner as to invite intervention by members of the regulated industry and other interested persons in opposition to applications for certificates of the kind here involved. The regulatory agencies often encourage such intervention in order to provide them with pertinent information concerning public convenience and necessity without which these applications would be in effect mere one-sided proceedings."

2. The Complaint On Its Face Shows That The ICC And PUC (As Well As The Plaintiffs Themselves) Considered The Information And Views of Defendants Relevant, And The Complaint Concedes That The Agency Decisions Were Influenced By Defendants' Participation.

The complaint alleges consistent protests over an extended period beginning in early 1961 and continuing up to the filing of the amended complaint in 1967. There is no allegation that the ICC or PUC rejected such protests, either on their own initiative or on the motion of plaintiffs. Since each commission had full control of its procedures at all times (there is no allegation to the contrary) the inference may properly be drawn that each commission considered the information and views of defendants relevant. Indeed, one may infer that plaintiffs themselves conceded such relevance because there is no allegation that they ever sought to prevent defendants from participating in the proceedings, whether by petition to the ICC, the PUC, or the reviewing courts.

That defendants' participation did influence commission decisions is specifically conceded in the following words of the complaint (Jt.App. 10):

> "(10) The defendants, acting in concert, became capable of instituting opposition procedings . . . and have thereby defeated or restricted . . . rights . . . applied for . . . on the basis of decisions rendered on the merits of the issues presented. Such decisions which [sic], but for the defendants' combination and conspiracy would not have been rendered adverse to plaintiff and other competitors of defendants, because no opposition would otherwise have been commenced."

Plaintiffs do *not* allege that defendants were always able to convince the commission to act as defendants ad-

vocated. Plaintiffs have conceded the contrary. See Judge Sweigert's remarks. (Jt.App. 35.) The proper inference is that the commission weighed the information and views of defendants along with other relevant presentations and then exercised its expert judgment in each case.

D. Existing Certificate Holders Occupy A Position Of Public Trust In Coming Forward With The Presentation Of Relevant Information And Views.

In coming forward as protestants, existing carriers occupy a dual role: they represent not only their selfish interests but simultaneously the public interest and thereby occupy a position of public trust. By accepting a certificate they dedicate their service to the public. Such dedication imposes substantial burdens. Unlike businessmen engaged in non-public callings, they may not pick and choose their customers, keeping only those they prefer for economic or other reasons; they may not change their rates at will to meet competition; they may not even go out of business at will. They have a continuing public utility obligation to provide service, without discrimination, at rates determined by the commission, and with equipment and service conditions acceptable to the commission.

Since such carriers have the obligation to *maintain* their service in the public interest, it is reasonable to hold that they always have standing in certificate proceedings, with a right to participate, subject of course to such procedural rules as the commission sets down. The certificating process is a seamless web in which they are obligated to have a continuing interest, both for themselves and on behalf of the public.

The complaint alleges that defendants have consistently protested all applications "with or without probable cause, and regardless of the merits". (Jt.App. 7.) This amounts to no more than saying that defendants did not try to make their own private determinations of whether public convenience and necessity justified the certificating in question; on the contrary, they consistently volunteered whatever evidence and opinion in opposition to additional certification they could produce, leaving to the agency the ultimate determination. In this area where the elements of discretion and policy loom so large, the legal concept of "probable cause" really has no place. The PUC and ICC in granting or denying certificates do not adjudicate rights but simply determine whether a privilege should be conferred or withheld.

In carrying out their function of public trust in participating in certificate proceedings, existing certificated carriers can furnish not only factual information readily available to them respecting their respective operation, but information and opinions based on practical experience on such subjects as the effect upon service efficiency arising from a proliferation of certificates, the reaction of given segments of the shipping public to the presence of a new carrier, the problems of holding patronage, the manner in which new traffic can be generated, and the impact of varying degrees of competition upon rates. These and other subjects all have significance in assisting the commission to act in the public interest.

The position which existing certificate holders occupy in protesting certificate applications may be analogized to that of a "private attorney general". Ever since *FCC*

v. Sanders Brothers Radio Station, 309 U.S. 470 (1940) there has been a growing recognition of the valuable role which can be played by those willing to come forward to express some facet of public interest even though lacking in the kind of "legally protected interest" standing traditionally required by the courts in earlier years. See for instance *Seatrain Lines, Inc. v. United States,* 152 F. Supp. 619, *aff'd* 355 U.S. 181 (1957); *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2d Cir. 1965); *Office of Communication of the United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1966).

In the *Seatrain* case, Seatrain having an anticompetitive motive sought to intervene before the ICC to protest the granting of an exemption from regulation similar to its own, to its competitor Pan-Atlantic. Intervention was allowed by the ICC and was approved by the district court which also recognized the standing of Seatrain to seek review of the ICC's action. The district court said (152 F.Supp. at 625):

> "Seatrain has alleged injury of a substantial character in the form of actual and projected losses of revenue due to the rate structure of Pan-Atlantic. Seatrain does not seek in this action a declaration that such rates are unjustified. *Rather, it seeks to protect the public interest by having the Commission base its decision upon findings under the National Transportation Policy.*" (Emphasis added.)

In the *United Church of Christ* case, the court of appeals, per Circuit Judge Burger, in holding that members of the public had standing in a proceeding before the FCC for a radio broadcast license, said (359 F.2d at 1002):

> "Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience."

The court went on to hold that it is no answer to say that the commission was directed by Congress to protect the public interest and could therefore act without benefit of outside information:

> "Nor does the fact that the Commission itself is directed by Congress to protect the public interest constitute adequate reason to preclude the listening public from assisting in that task. . . . The Commission of course represents and inded is the prime arbiter of the public interest, but its duties and jurisdiction are vast, and it acknowledges that it cannot begin to monitor or oversee the performance of every one of thousands of licensees." 359 F.2d at 1005.

The latest pronouncement reflecting recognition of value in participation by those with a legitimate interest is *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970) in which the Association was held to have standing to challenge a ruling by the Comptroller of the Currency that national banks could make data processing services available to bank customers and other banks. See also, Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 Harv. L. Rev. 255 (1961); Shapiro: *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv. L. Rev. 721 (1968).

The complaint alleges that the defendants established a trust fund to finance their participation before the public bodies, with contributions from each defendant in proportion to its yearly gross income. The complaint further alleges that defendants agreed jointly to finance all opposition "which, if such opposition were not so financed, would not have been made at all because of the great expense involved in such a program of protests." (Jt.App. 6.) The effect of these allegations is to say that the defendants would have found it economically infeasible to participate and present their views had they not shared the costs. Such sharing cannot be condemned as an unlawful combination in itself, and given the element of public trust together with the other factors which weigh on the side of immunity from the Sherman Act, one must conclude that the sharing of costs only served to enable the defendants to act in the public interest. As the District of Columbia Circuit stated in the *United Church of Christ* (359 F.2d at 1006):

> "The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative procedings are such that even those with large economic interests find the costs burdensome."

Defendants submit that the public trust aspect of the standing of existing certificate holders in certificate proceedings provides a sound reason, in addition to those

set forth in *Noerr,* for holding that the Sherman Act does not extend to the present complaint.

III. THE FIRST AMENDMENT RIGHT TO ASSEMBLE AND PETITION.

A. A Construction Of The Sherman Act Should Be Adopted Which Avoids A Serious Constitutional Issue.

In *Noerr* one of the reasons given for construing the Sherman Act to exclude joint appeals to governmental bodies was that a contrary construction would raise the serious question whether First Amendment rights would thereby be infringed. On this subject, the Court said (365 U.S. at 137, 138):

> "Secondly, and of at least equal significance, such a construction of the Sherman Act [to include joint appeals to government] would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above."

Thus the Court was invoking the well-established tenet of statutory construction that Congress is presumed to have chosen to avoid constitutional dangers. *Kent v. Dulles,* 357 U.S. 116 (1958); *Yates v. United States,* 354 U.S. 298 (1957). First Amendment rights occupy a preferred position in our constitutional scheme. See *New York Times Co. v. United States,* 39 U.S.L.W. 4879 (U.S. June 30, 1971).

As in *Noerr* and *Pennington,* extension of the Sherman Act to the facts alleged in the present complaint would raise the First Amendment question in a serious way, regardless of the resolution which might be made if the question were reached. Defendants therefore submit that the tenet of statutory instruction should be applied, and the presence of the constitutional question should be treated as an important reason in addition to those discussed above ("essential dissimilarity", substantial impairment of effective governmental determinations if government is deprived of relevant information, obligation of public trust held by certificated carriers in certificate proceedings) for construing the Sherman Act not to extend to the facts alleged in the present complaint.

B. The Sherman Act Would Violate The First Amendment Right To Assemble And Petition If Construed To Apply To The Facts Alleged.

Even if the reasons described above were held ineffective to limit the Sherman Act in the way urged by defendants, the complaint fails to state a cause of action because application of the Sherman Act to the facts alleged would be unconstitutional.

1. Nature Of First Amendment Rights.

The First Amendment (set out in full in the Attached Appendix, page i) provides that:

> "Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

These rights are cognate and inseparable, as this Court stated in *Thomas v. Collins,* 323 U.S. 516, 530 (1945):

"It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, . . ."

2. The Alleged Activities Are a Form of Political Expression Protected By The First Amendment.

The right to speak and petition extends not only to appeals to the legislature and executive branches of the government but the judicial as well. *NAACP v. Button,* 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *United Transportation Union v. State Bar of Michigan,* 39 U.S. L.W. 4428 (U.S. April 5, 1971).

Button involved a Virginia statute making it unlawful (a) to advise a person that his legal rights had been infringed and then to refer him to a particular group of attorneys for assistance, and (b) to render such assistance upon such referral. The statute was struck down as a violation of the First Amendment right to petition and seek redress of grievances. This Court said that litigation under the circumstances was a means of achieving a lawful objective, viz., equal treatment for Negroes, and not a technique for resolving private differences. "In such context," said the Court, "[litigation] is . . . a form of political expression." 371 U.S. at 429.

Similarly in the present case the participation by defendants in the certification process was a means of achieving governmental determinations, based upon pub-

lic interest, that additional certification would run contrary to public convenience and necessity. Such participation was not for the resolution of private differences. There is no such thing as a right to receive a certificate, nor is there such a thing as a right by existing certificate holders to keep others from receiving certificates. The touchstone is always public interest.

Defendants submit that their alleged activities constituted a form of political expression which should be protected by the First Amendment against the application of the Sherman Act just as the litigation in *Button* constituted a form of political expression which was protected by the First Amendment against a restrictive Virginia statute. This conclusion should follow particularly in the area of certificating which contemplates governmental restraints upon trade.

The Ninth Circuit majority seeks to explain away the impact of *Button* by implying that whereas in that case the *NAACP* acted with a lawful purpose in urging utilization of the courts, the defendants here did not act with a lawful purpose in participating before the ICC, the PUC and the courts. (Jt.App. 51, 52, footnote 6.) Such distinction cannot hold up. It is not the defendants' anticompetitive motivation which should be compared with NAACP's objective of equal treatment for Negroes, but rather the defendants' objective of persuading the ICC, the PUC and the courts to draw certain conclusions in the public interest. That was a lawful objective, like the objective to secure equal treatment for Negroes.

This Court has in fact gone far in holding that the protection of the First Amendment applies to petitions

to government. *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *United Transportation Union v. State Bar of Michigan,* 39 U.S. L.W. 4428 (U.S. April 5, 1971). The *Illinois* case held that it was unconstitutional to find as unauthorized practice of the law, an arrangement under which the United Mine Workers employed an attorney on a salaried basis to represent union members wishing such attorney's services to prosecute Workmen's Compensation claims. This Court said (389 U.S. at 223):

> "The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button,* but the First Amendment *does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones, are guarded.* The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.' *Thomas v. Collins,* 323 U.S. at 531, . . ." (Emphasis added.)

3. The Ninth Circuit Majority's Conclusion That First Amendment Protection Must Yield To The Sherman Act Is Not Supported By Authority and Is Not Justified By Reason.

There is no reasonable basis to hold, as the Ninth Circuit majority did upon superficial analysis (Jt.App. 51, footnote 6), that ". . . on balance, the public interest in free competition served by the condemnation of agreements to use judicial and administrative adjudicative processes for the purpose of restraining trade outweighs the resulting restraint upon First Amendment rights".

The Ninth Circuit majority would weigh "free competition" against First Amendment rights. This ignores the fact that the U.S. Congress and California legislature have determined that the preferred social value in the trucking industry is not "free competition" but rather *regulation* by the ICC and PUC. In weighing then, we must add to the First Amendment side of the scale not only the First Amendment rights of the protestants themselves, but also the social value of the administrators receiving truthful information pertinent to the proper discharge of their duties at no investigative cost to the government. It must be presumed that decisions based on this information will be better decisions and hence in the social interest.

On the other side of the scale it is proper to weigh the added cost to applicants of presenting their case, and the possibility that a certain number of them will be deterred, as plaintiffs allege, from making applications. But these are both circumstances which are inherent and must therefore necessarily be accepted in the regulatory scheme adopted by the federal government and by California, under which it is contemplated that the privilege of certification will be conferred only upon proof of the public interest under the broad guide of public convenience and necessity. It is unfortunate that the administrative process should be expensive, and it is unfortunate that some who might be entitled to certification fall back in the face of opposition. Those are circumstances which under our system of government should carry little weight as opposed to the very strong protection of the First Amend-

ment and the compelling need of government to be informed.

We have examined the cases relied upon by the Ninth Circuit majority in which First Amendment rights have been subordinated to a statutory prohibition. All of them except perhaps the 1951 pre-*Noerr* and pre-*Pennington* district court case of *Slick Airways v. American Airlines,* 107 F.Supp. 199 (D. N.J. 1951), *appeal dismissed,* 204 F. 2d 230 (3rd Cir. 1953), present cogent reasons for subordinating the First Amendment. There are no such reasons here.

Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965) involved an infringement suit on a patent obtained by the perpetration of actual fraud upon government—by supplying information known to be false to the U.S. Patent Office.

United States v. Singer Manufacturing Co., 374 U.S. 174 (1963) involved an agreement under which the conspirators deprived the Patent Office of pertinent information. Thus Mr. Justice White in his concurring opinion stated (374 U.S. at 199, 200):

> "Singer and Gegauf agreed to settle an interference, at least in part, to prevent an open fight over validity. *There is a public interest here . . . which the parties have subordinated to their private ends*—the public interest in granting patent monopolies only when the progress of the useful arts and of science will be furthered because as the consideration for its grant the public is given a novel and useful invention, When there is no novelty and the public

parts with the monopoly grant for no return, the public has been imposed upon and the patent clause subverted . . . clearly *collusion among applicants to prevent prior art from coming to or being drawn to the Office's attention is an inequitable imposition on the Office and on the public* . . . In my view, such collusion to secure a monopoly grant runs afoul of the Sherman Act's prohibitions against conspiracies in restraint of trade—if not bad per se, then such agreements are at least presumptively bad. . . ." (Emphasis added.)

Kobe v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952) involved purposeful acquisition of a monopoly position by purchase and pooling of patents, as well as extensive direct communications by the patentee to the alleged infringer's customers. The facts in *Lynch v. Magnavox*, 94 F.2d 883 (9th Cir. 1938) were substantially similar.

The *Slick Airways* case (*Slick Airways v. American Airlines*, 107 F.Supp. 199 (D. N.J. 1951), *appeal dismissed*, 204 F.2d 230 (3rd Cir. 1953)), arose on motion to dismiss a complaint under the antitrust laws alleging a conspiracy to monopolize and restrain trade utilizing three means: (1) predatory rate policies, (2) abuse of the privilege of intervention in CAB certificate application hearings of plaintiff, and (3) a campaign of unfair competitive practices. The case appears to have been presented to the Court and considered by it chiefly as presenting an issue of primary jurisdiction. This impression is reinforced by the court of appeals decision, 204 F.2d 230 (3rd Cir. 1953). The district judge concluded his dis-

cussion of the alleged abuse of intervention in the certificate hearings as follows:

> "While *it may be questioned* whether any of this alleged activity by defendants *of itself* constituted illegal conduct, . . . this court cannot deprive the plaintiff of its right to attempt to prove that these alleged acts were *part of the total acts undertaken* to effectuate the alleged conspiracy." 107 F.Supp. at 214. (Emphasis added.)

Thus the case is not a holding, despite the Ninth Circuit majority's reliance upon it, for the proposition that appeals to the CAB, alleged to be abuse of process, are actionable, standing alone, under the Sherman Act. The court indeed indicated that the answer might be in the negative. The court found a way to avoid answering that question by saying that as part of a larger scheme such appeals would be actionable. That was the error. We now know from *Pennington* which was decided some fourteen years later that appeals to governmental bodies are free of Sherman Act proscriptions "either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670.[12]

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[12]In seeking to establish the integrity of the *Slick* decision, the Ninth Circuit majority notes that it was cited with approval in *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 707 (1962). However, the point in question was not resolved until *Pennington* in 1965.

4. This Court Has Zealously Guarded First Amendment Freedoms From The Chilling Effect Of Standards Which Cannot Be Clearly Perceived.

In *NAACP v. Button*, 371 U.S. 415 (1963), this Court, per Mr. Justice Brennan, said (317 U.S. at 432, 433):

> ". . . we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. [Citing cases]
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> * * *
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> These [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

Under this test the Sherman Act cannot constitutionally be applied to the facts alleged. The Ninth Circuit majority reads the complaint as alleging abuse of process by making known and carrying out a plan of protesting all certificate proceedings before the ICC, the PUC and the courts. In the context of governmental action directed not to adjudicating private rights but to granting or withholding privilege as determined by public interest, the term "abuse of process" has ambiguous meaning at best. The complaint alleges that defendants participated in certificate proceedings "with or without probable cause, and regardless of the merits." (Jt.App. 7.) Since a certificate holder is vested with public utility obligations and speaks in part for the public, these terms really do not apply. Yet, according to the holding of the

Ninth Circuit majority it would become crucial, in determining Sherman Act liability, to draw a line between "probable cause" and lack thereof, as well as between "merit" and lack thereof, by some test not revealed. The demarcation of such a line is feasible where private rights, such as the absolute monopoly rights granted under patent law, are involved, but not where the issue is whether public interest dictates the conferring or withholding of a privilege.

Defendants submit that the absence of a clear test under the Sherman Act as construed by the Ninth Circuit majority, by which existing certificate holders can determine how far they can go without violating that Act, produces a chilling effect upon First Amendment freedoms and thereby makes the Act unconstitutional if construed to apply.

It is plain to see why such a large number of trade associations across the country have expressed their concern over the holding of the Ninth Circuit majority. If the decision is allowed to stand such associations will be acting at their peril each time they participate through joint action of their members in making their views known to administrative agencies and courts concerned with restrictive actions based upon public interest. This is a result which we believe this Court will not countenance.

IV. THE FACTS ALLEGED IN THE COMPLAINT DO NOT FALL WITHIN THE "SHAM" EXCEPTION OF NOERR: DEFENDANTS GENUINELY INTENDED TO INFLUENCE THE ICC, THE PUC AND THE COURTS.

The "sham" exception is a dictum in *Noerr* which has a clear meaning in its context. The words, per Mr. Justice Black, are (365 U.S. at 144):

> "There may be situations in which a *publicity campaign,* ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denied that the railroads were making *a genuine effort to influence legislation and law enforcement practices.*" (Emphasis added.)

The publicity campaign in question was the campaign used by the railroads to influence the legislature, the governor, and law enforcing officers. Rather than appeal to these governmental bodies directly the railroads had hired a public relations firm which approached members of the public, who in turn made representations to the governmental officials. This led to the possibility that perhaps the railroads were not actually trying to influence the governmental bodies to take action hurtful to the truckers but rather were trying to destroy the goodwill of the truckers among the public generally and among the truckers' customers particularly. 365 U.S. at 142. In that case the indirect approaches to the governmental bodies would be "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor".

The Court in *Noerr* then proceeded to make doubly clear what it meant by "sham". It said that there was no sham because (365 U.S. at 144):

> "No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices".

This conclusion was fortified by the fact that the effort, in addition to being genuine, was "also highly successful". 365 U.S. at 144.

It follows that if the facts involve a genuine attempt to influence governmental officers—genuine in the sense that there is a genuine effort to persuade such officers to take certain action—there is no sham, regardless of intent. The facts of *Noerr* revealed a sole purpose to destroy the truckers by influencing governmental action. It *also* included an intent to do more than merely seek to influence governmental action, viz., an intent (365 U.S. 142):

> "... '*to hurt the truckers in every way possible even though they secured no legislation*'. (Emphasis in original.) Specifically the District Court found that the purpose of the railroads was to destroy the goodwill of the truckers among the public generally and among the truckers' customers particularly . . . and that the railroads were successful in these efforts to the extent that such injury was actually inflicted".

This was not enough to render the *Noerr* principle inapplicable *because* there were no findings that the railroads "attempted directly to persuade anyone not to deal with the truckers". 365 U.S. at 142. The Court said such findings (365 U.S. at 143, 144):

> ". . . can mean no more than that the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen. . . It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of the campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. *To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.*"

In effect the Court said, given a genuine intent to influence governmental action—genuine in the sense that a genuine effort is made to persuade governmental officials to take certain action—it becomes immaterial what other intents or purposes may be present. The rationale is that to hold otherwise would deprive government of valuable information and, conversely, impair the First Amendment right to petition. In other words, the reasons for finding a Sherman Act exemption are equally compelling whether there is the single intent genuinely to influence governmental action or whether such intent is coupled with another, even primary, intent to destroy or injure.

The instant case presents a close parallel, but its facts are even stronger for the proposition that there was no "sham" as the Court in *Noerr* used that term. No dealing through intermediaries is involved. The only acts complained of are the defendants' direct approaches to the

governmental bodies. There is no allegation of any other conduct such as an attempt directly to persuade people not to deal with the plaintiff truckers. That the defendants made a genuine effort to persuade the ICC, the PUC and the reviewing courts to take certain action is spelled out in the complaint and is recognized by the Ninth Circuit majority. (Jt.App. 59.)

Given these facts there can be no "sham" as *Noerr* used that word. Whatever other intent or motive may have accompanied such acts, that other intent or motive does not affect the *Noerr-Pennington* immunity. As the Court, per Mr. Justice White, said in *Pennington* (381 U.S. at 670):

> "Noerr shields from the Sherman Act a concerted effort to influence public officials *regardless of intent or purpose.*" (Emphasis added.)

The Ninth Circuit majority was unwilling to accept the limitations of the sham exception and created a broader sham exception of its own. In disregard of the proposition that other purposes or intents are immaterial, once it is established that the efforts to influence governmental action are genuine and intended to be as effective as possible, the Ninth Circuit majority indulged in a consideration of primary and secondary intent. It concluded (although there is no express wording in the complaint upon which such conclusion can be rested) that the alleged "primary purpose" was to inflict injury "directly" by deterring plaintiffs from seeking certificate authority, and that inevitably "indirect" injury was accomplished "by influencing rulings of the agencies and the courts". (Jt.App. 59.)

Defendants submit that such reasoning is fallacious. It injects intent as a significant factor despite this Court's clear statement that other intents are irrelevant once an intent genuinely to attempt to influence governmental action is established. It disregards the reasons for the *Noerr* exemption which are just as compelling when there are several intents as well as when there is only the single intent genuinely to influence governmental action. Moreover, the holding of the Ninth Circuit requires an unrealistic and esoteric speculation into degrees of intent. Even those directly involved in genuine efforts to influence governmental action would have difficulty sorting out in their own minds whether their "primary" intent was to influence the governmental officials or to restrain competition. Certainly the latter intent is always present whenever competitors seek to influence governmental bodies to take restrictive action. Since the *Noerr* exemption would hinge on the result of that speculation, a chilling effect upon the exercise of First Amendment rights would be produced in a way similar to the chilling effect described earlier which would arise from attempting to apply the Sherman Act according to a vague standard of "probable cause" or "merit" in proceedings involving not private rights but public interest.

In short the Ninth Circuit majority's sham exception would undermine the very reasons assigned by the Court in *Noerr* for finding the Sherman Act not applicable to joint appeals to governmental officials.

V. THE EXTENSIVE REGULATORY SUPERVISION OF THE PUC AND ICC MAKES APPLICATION OF THE SHERMAN ACT UNNECESSARY. THE RULE OF REASON.

The literal words of the Sherman Act condemning every restraint of trade have been tempered by the rule of reason expressed long ago in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). In that case the Court said (221 U.S. at 60):

> "... [the statute] is broad enough to embrace every conceivable contract or combination ... anywhere in the whole field of human activity. . . the standard of reason which had been applied at the common law in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."

The rule of reason demands that recognition be given to the appropriate functions of administrative agencies and the courts, as well as to the appropriate areas for exercise of federal and state authority. In *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945) this Court expressed it this way:

> "[The Sherman Act] does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. 'The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not likely to be imputed to Congress.' Apex Hosiery Co. v. Leader, 310 U.S. 469, 513."

In the present case the Sherman Act is an inappropriate and unnecessary vehicle to correct whatever abuses there may be flowing from defendants' protests to the grant or transfer of certificates. As dissenting Circuit Judge Hamlin said below (Jt.App. 60):

> "The Public Utilities Commission has the power and ability to correct any abuses flowing from the activities of defendants through their opposition to the grant or transfer of certificates, see California Public Utilities Code §§1062, 1064, and I think that the plaintiffs must look to the Commission, rather than to the Sherman Act, for their remedy".

A similar conclusion applies to the ICC. Each of these bodies is vested with all the authority necessary to deal with any alleged abuse of the administrative process. See Attached Appendix, pp. iii-xxvii.

In a vein similar to that of Circuit Judge Hamlin, the opinion of Judge Sweigert of the District Court below states (Jt.App. 37):

> "As impliedly recognized in Noerr, the 'probable cause' or 'merit' of such applications or oppositions as are presented to the regulatory agency (or to the legislative or other executive officials) can be left to their responsible expertise (and appropriate judicial review) rather than be presented to the courts *in the guise of an antitrust suit.*" (Emphasis added.)

On this subject a penetrating analysis was made by Mr. Costilo of the Antitrust Division of the Department of Justice in his article, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense,* 66 Mich. L. Rev. 333 (1967).[13] He remarked at pages 343, 344:

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[13]The article is accompanied by a footnote (66 Mich. L. Rev. 333) stating that the views are personal to the author.

"The closer the agency supervision of the anti-competitive conduct in question, the greater the justification for removing the protections of the antitrust laws, because of the added assurance that the conduct is subject to the careful review of some public body—even if it is not a court. Thus in *United States v. Socony Vacuum Oil Co.* [310 U.S. 150 (1940) at 227 n 60], it was stated that 'the typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives'.

* * *

"In addition to the closeness of regulation, courts have also been influenced by whether the governmental apparatus provided procedural safeguards to prevent groups of competitors from taking advantage of smaller, non-allied competitors having adverse commercial interests. Although these considerations have become somewhat obscured by *Noerr*, an analysis of *Pennington* and the main cases cited in support of the broad language in the *Noerr* opinion indicates they are very much with us—although not always articulated." (Footnotes omitted.)

After referring to the rather comprehensive machinery in *Pennington* as well as in *United States v. Rock Royal Co-operative, Inc.* (307 U.S. 533 (1939)) and *Parker v. Brown*, 317 U.S. 341 (1943)), the author concluded, at 346:

"It is not suggested that this rationale will apply to all *Noerr-Pennington* type issues. But in those cases where the pertinent statutory provisions are ambiguous it is useful to determine whether the government merely adds its rubber stamp to the private anti-competitive scheme, or whether there is a more searching independant inquiry".

In the present case there can be little doubt that the machinery for adequate regulatory control, both at the procedural and substantive level, is present. Indeed, the comprehensiveness of regulation vested in the ICC and PUC, both as to procedure and substance, in certificate matters is perhaps as great as one can find anywhere in the country. A scanning of the statutory and procedural material appended to this brief (Attached Appendix, pages iii-xxvii) gives an indication of the sweep of this control.

The assurance that any ultimate restriction in restraint of trade will be at the behest of government acting with independence of judgment, and not at the behest of competitors acting through government, is of course an important element in applying the *Noerr-Pennington* exemption. The Court in *Noerr* started its discussion by saying (365 U.S. at 136):

> "... it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out."

The authorities cited in support of this holding were *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939) and *Parker v. Brown*, 317 U.S. 341 (1943).

One of the most recent instances of such Sherman Act immunity is found in *Washington Gas Light Company v. Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971). It was there held, upon authority of *Parker v. Brown*, that the filing of rates by an electric utility with a commission which had full regulatory control over such rates protected the electric company against Sherman Act violation even though the purpose of such rate-filing

was anti-competitive. The fact that the commission had not affirmatively approved such rates was held not to change the result. The Court said (438 F.2d at 252):

> "The antitrust laws are a poor substitute, we think, for plaintiff's failure to promptly protest to the SCC [state commission having regulatory jurisdiction over utility rates] and to seek the administrative remedy ultimately shown to have been available and effective. We think VEPCO's [Virginia Electric Power Company's] promotional practices were at all times within the ambit of regulation and under the control of SCC, and we hold these practices exempt from the application of the laws of antitrust under the *Parker* doctrine".

In the present case there is no allegation that the PUC or the ICC or the courts have at any time lacked, or been prevented from exercising, full control over the extent to which they would allow defendants to protest and participate. There is no allegation that the PUC or the ICC or the courts have at any time been prevented from exercising full control over their determinations on the merits. Thus, such condemning characterizations in the complaint as that defendants have "become the regulators . . . . rather than the PUC, the ICC and the courts" (Jt.App. 11) lack factual foundation. Indeed, it was not questioned either by the Court of Appeals or by the District Court below that, under the allegations of the complaint, the governmental bodies had full control over their procedures and their determinations at all times.

Perhaps it was because of a desire to give the plaintiffs every opportunity to make out a cause of action by pleading, if they truthfully could, a subjugation of the

governmental bodies, that Judge Sweigert commented (Jt. App. 43):

> "The pleading has already been once amended and, presumably, plaintiffs have gone as far as they can truthfully go toward alleging an antitrust violation".

Notwithstanding, he gave plaintiffs another fifteen days within which to amend, an opportunity of which they did not avail themselves.

Because of the very broad regulatory control lodged in the ICC and PUC, the situation presented in the present complaint is quite different from that in patent antitrust cases. There is no agency of government which performs, as to patents, a function comparable to that performed by the PUC and ICC. No agency has the power and the mandate to determine that the public interest would be served by certifying additional entities to exploit a given patent. Unlike an operating certificate holder, a patent holder is given an absolute monopoly. The tension between the patent holder's right and the objectives of the antitrust laws is thus starkly presented. No government watchdog stands ready to guard against the many abuses which a patent holder may be tempted to engage in with a view to expanding his economic power beyond its legally limited confines. Through application of the antitrust laws a policing of abuses of patents by the courts can be accomplished. No such necessity exists here, since the ICC and PUC stand ready and able to perform the task.

VI. SUMMARY OF SELECTED LOWER COURT AUTHORITIES.

We present here for the Court's consideration a summary of some of the many lower court opinions applying the *Noerr-Pennington* doctrine. No case prior to the present one has held or indicated the view that *Noerr-Pennington* is limited in the manner held by the Ninth Circuit majority. Indeed, one case, *Bracken's Shopping Center v. Ruwe*, 273 F.Supp. 606 (S.D. Ill. 1967) has specifically held that the doctrine applies to concerted appeals to the judiciary. Another, *Association of Western Railroads v. Riss*, 299 F.2d 133 (C.A. D.C. 1962) held that *Noerr-Pennington* shields appeals to the I.C.C. with respect to its function of certificating interstate truckers.

As to those cases finding that the *Noerr-Pennington* immunity does not apply, it will be seen that they, too, lend support to the defendants' position that the doctrine, properly conceived, protects the alleged conduct in the instant case.

A. Cases Applying the Noerr-Pennington Immunity.

(1) *Bracken's Shopping Center v. Ruwe*, 273 F.Supp. 606 (S.D. Ill. 1967): defendants conspired to file in the state court a representative suit challenging the validity of a statute under which the city had vacated certain streets. In granting a motion to dismiss the court said (page 607):

> "Since the complaint alleges no other act or conspiracy, the court grants the defendants' motions to dismiss because it does not believe that *resort to the judiciary*, even in concert or in an effort to restrict competition, can violate the antitrust laws of the United States". (Emphasis added.)

The court went on to refer to *Noerr* and *Pennington* and stated that those cases stand for the general proposition that "seeking lawful legislative, executive, or judicial action does not violate the antitrust laws, even if interstate commerce is involved and even if the purpose and effect is to curtail competition."

(2) *Association of Western Railroads v. Riss,* 299 F.2d 133 (C.A. D.C. 1962); case below is reported at 170 F. Supp. 354 (D.C. D.C. 1959): combination of 58 railroads, several railroad trade associations, and a public relations firm, to carry on a program of soliciting, directly and indirectly, various state officials to take steps leading to the revocation and cancellation of interstate motor carrier operating rights held by plaintiff. A public relations expert was hired to persuade the Public Utilities Commission of Ohio to file proceedings before the ICC looking toward cancellation of plaintiff's operating authority. There also was solicitation of state and city officials to enact laws, ordinances and regulations designed to hamper and to render economically infeasible the operations of plaintiff. Also state officials were urged to carry out a campaign of unusually strict enforcement of statutes, ordinances and regulations aimed at plaintiff's vehicles, even to the point of urging the Public Utilities Commission of Ohio to assign special investigators to follow the plaintiff's trucks.

The combination was also alleged to have abused its privilege of intervention in proceedings before the ICC by carrying on an extensive campaign of anti-truck propaganda in order to persuade citizens' groups and others to register their complaints against plaintiff in the course of

proceedings started by plaintiff before the ICC to obtain new operating authorities.

Relying on *Noerr* the Court of Appeals for the District of Columbia held all these acts beyond the reach of the Sherman Act.

(3) *Baltimore & O. Ry. Co. v. N.Y., N.H. & H. Railway*, 196 F.Supp. 724 (S.D. N.Y. 1961): the action challenged under the antitrust laws consisted of (a) propagandizing the Interstate Commerce Commission for the proposition that an increase in the per diem car rate would increase car supply and eliminate car shortages, (b) propagandizing the Senate Committee on Interstate and Foreign Commerce to like effect, (c) utilizing the process of the Interstate Commerce Commission to make increased per diem charges binding upon the complainants, and (d) utilizing the process of the federal court to force payment of certain per diem charges. The court, in reliance upon *Noerr*, dismissed these contentions with the following language (196 F.Supp. at 748):

> "Finally, neither the filing of suit nor the propagandizing of the Commission in furtherance of plaintiffs' joint effort to impose these rates is in violation of the Sherman Act. [citing *Noerr*] Whether plaintiffs have been withholding tariffs in an attempt to enforce the rate is a question which can be raised and determined in the Commission proceedings and with which the Commission is particularly concerned and better able to dispose of."

(4) *Schenley Industries, Inc. v. New Jersey Wine and Spirit Wholesalers Association*, 272 F.Supp. 872 (D. N.J. 1967): the allegation was that a wholesale liquor dealers' association attempted to use improper influence upon the

State Division of Alcoholic Beverage Control in order to obtain favorable decisions. The court in concluding that the portions of the complaint which alleged such activities should be stricken said (272 F.Supp. at 884):

> "In addition, however, Schenley continues to suggest that the lobbying itself, if sufficiently illegal apart from its antitrust aspect, is not shielded from liability under the Sherman Act. Schenley argues that Noerr and Pennington protect lobbying merely misleading or unethical, but do not extend to acts flagrantly violative of state law.
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> * * *
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> "Noerr and Pennington make clear that concerted private effort to influence government action does not violate the Sherman Act, no matter how self-interested, devious, or anti-competitive".

(5) *A.B.T. Sightseeing Tours Inc. v. Gray Line N.Y. Tours,* 242 F.Supp. 365 (S.D. N.Y. 1965): combination to persuade legislative bodies and administrative agencies of the City of New York to enact and promulgate laws and regulations which would suppress and eliminate competition between defendants and plaintiffs. A motion to strike this part of the complaint was granted, citing *Noerr.*

(6) *U.S. v. Johns-Manville Corporation,* 259 F.Supp. 440 (E.D. Penn. 1966): informal approach to municipal authorities to persuade them to impose restrictive specifications on pipe which the municipal authorities would accept. Such activity was held not subject to the antitrust laws, by reason of *Noerr* and *Pennington.*

(7) *Harman v. Valley National Bank of Arizona,* 339 F.2d 564 (9th Cir. 1964): combination to inform the Attorney General of Arizona (alleged to have been a participant

in the combination) of alleged irregularities and to persuade him to file a suit against a savings and loan association for irregularities under the state statute. The suit resulted in placing the savings and loan association in receivership and closing its business. This hurt the plaintiff because it was unable to get the receiver to approve a contractual claim against the savings and loan association. The plaintiff brought an antitrust action. The Ninth Circuit agreed that *Noerr* would apply whether or not the proceeding brought by the Attorney General had substantive merit. The court reasoned that:

> ". . . to make Sherman Act liability depend upon ultimate resolution of often difficult questions of law and fact relating to the validity or propriety of solicited governmental action 'would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade' (365 U.S. at 137, 81 S.Ct. at 529), and 'would raise important constitutional questions' because of the inevitable burden which such a construction of the Sherman Act would impose upon the right of the people to petition the government for the redress of grievances. 365 U.S. at 138, 81 S.Ct. at 530." 339 F.2d 564 at 566.

Nevertheless, the court reversed the grant of dismissal noting that clarification of the complaint was necessary, and that two possibilities for relief were open. First, the complaint could be read as alleging the joint effort to influence the Attorney General was but one part of a larger scheme to restrain and monopolize commercial banking. (This, of course, was a pre-*Pennington* case. The possible implication of the court that the existence of a "larger scheme" could taint otherwise *Noerr* protected

conduct would be erroneous under *Pennington*.) Secondly, respecting the allegation that the Attorney General was a co-conspirator, the court noted that neither *Parker* nor *Noerr* compelled the conclusion that such a case would be immune.

(8) *Central Savings and Loan Association of Chariton, Iowa v. Federal Home Loan Bank Board*, 422 F.2d 504 (8th Cir. 1970): Complaint by group of banks and savings and loan institutions alleging that defendant bank violated Sherman Act §§ 1 and 2 by applying to the Federal Home Loan Bank Board for authority to operate mobile lending facilities in a number of surrounding smaller communities where plaintiffs were located and applying to the same agency for permission to merge with another bank in the area. The lower court awarded summary judgment to defendant bank (293 F.Supp. 617 (S.D. Iowa, 1968)). In affirming, the 8th Circuit Court of Appeals observed (422 F.2d at 504):

> "Generally, however, solicitation of governmental action in accordance with a valid regulatory scheme for the sake of obtaining an economic or competitive advantage is not prohibited by the antitrust laws. [Citing *Noerr* and *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533.]"

B. Cases Holding Noerr-Pennington Inapplicable.

1. *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir., 1970), *cert, denied*, 400 U.S. 850 (1970): Complaint under Sherman Act §§ 1 and 2 against the designer and manufacturer of swimming pool gutters (Paddock) and its dealers by a competitor. The district court granted Paddock's motion for summary judg-

ment on the authority of *Noerr-Pennington*. The market for gutterless swimming pools is one which, due to the expense of construction of such pools, is limited almost entirely to public bodies or private bodies using public funds and hence subject to state and local government-imposed public bidding procedures. A public body desiring to install a pool typically hires an architect to draft specifications for use in the public bidding. Paddock sought to foreclose competition in this market by submitting to the architect drafts of specifications purporting to be neutral technical descriptions, but in fact, describing only Paddock's product in a variety of ways, and then endeavoring to persuade the architect, through personal visits to adopts its specifications. Paddock conceded for purposes of the motion "that it had combined with dealers and others to effect the use of its specifications in the public swimming pool industry, that its specifications were so drawn that only it could comply, and that its purpose was to eliminate competition" (424 F.2d at 27).

The Court of Appeals for the First Circuit reversed, rejecting *Parker v. Brown* and *Noerr-Pennington* as giving antitrust immunity.

As to *Parker v. Brown*, the court observed that, in adopting the specifications, the public bodies (by reason of Paddock's failure to disclose, it may be noted) never even considered the monopolistic practices hidden within the specifications, and hence, this adoption did not constitute a publicly imposed restraint within the meaning of *Parker v. Brown*. Moreover, the court noted that the government's imposition of the competitive bidding, which Paddock's conduct subverted, signified "its intent to respond to the

signals of a competitive market on the same terms as any other consumer, an intent which is entirely consistent with the aims of the Sherman Act." 424 F.2d at 31.

The court also alluded with apparent approval to the *district court opinion* in the instant case in the following passage:

> "Our reading of *Parker* convinces us that valid governmental action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation.
>
> "In terms of such deliberate governmental occupation of a field normally left to the free winds of competition, this case falls at the opposite end of the spectrum from *Parker*. At the *Parker* end of the spectrum lie cases like *Trucking Unlimited v. California Motor Transport Co.*, 1967 Trade Cas., ¶72,298 (N.D.Cal. 1967), a case involving certification of common carriers where the deliberate choice of a regulatory agency intervened between the private anti-competitive activity and the resulting restraint on trade." 424 F.2d 25 at 30.

The Court then turned to *Noerr-Pennington:*

> "The key to this decision [*Noerr*], in our opinion, is the Court's heavy emphasis on the political nature of the railroad's activities and its repeated reference to the 'passage or enforcement of laws.' The entire thrust of *Noerr* is aimed at *insuring uninhibited access to government policy makers.* A pluralistic society moves by many motives. The hope, supported by history, is that *permitting every interest to be heard* will produce a tolerable amalgam responsive to the needs of a given time. . . . By 'en-

> forcement of laws' we understand *some significant policy determination in the application of a statute* . . ." (Emphasis supplied.) 424 F.2d at 32.

Noerr, so interpreted, would obviously not protect Paddock's "communications" to government officials charged only with making "a technical decision about the best kind of weld to use in a swimming pool gutter." *Id.*

Further, the manner of the communication and its content rendered it unworthy of protection:

> "[T]he efforts of an industry leader to impose his product specifications by *guile*, *falsity*, and *threats* on a harried architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws." (Emphasis supplied.) *Id.*

2. *Woods Exploration & Producing Company, Inc. v. Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971) *petition for cert. filed*, 39 U.S.L.W. 3528 (U.S. May 15, 1971) (No. 1712): As here pertinent, this complicated litigation concerned the applicability of *Parker v. Brown* and *Noerr-Pennington* to defendants' filing of false nomination forecasts with the Texas Railroad Commission. The Commission relied upon the forecasts to determine the respective production quotas with respect to an oil field where plaintiffs and defendants were producers. The false forecasts caused the Commission to reduce plaintiff's production allowables. The district court awarded summary judgment to plaintiffs as to this part of the claim. In affirming, the Fifth Circuit reasoned, first, that there was no state action within the meaning of *Parker v. Brown* because the Commission had to rely upon the truthfulness of the producers

and did not intend its order to be based on false facts: "The Texas regulatory scheme at issue in this case does not sanction defendants' alleged conduct." 438 F.2d at 1296.

Similarly as to *Noerr-Pennington,* the court reasoned that there is *no policy determination* entrusted to the Commission in making production allocations, and hence, its function is "apolitical" and not protected by *Noerr.*

The court quoted with approval the view of *Noerr-Pennington* taken in the *Whitten* case, that *Noerr* is concerned with protecting access to officials charged with significant policy making functions.

The Fifth Circuit also relied, in part, on the Ninth Circuit majority's decision in the instant case. However, the court indicated its doubt as to the correctness of the Ninth Circuit's conclusion in these words (438 F.2d at 1297):

> "Characterizing the licensing procedure as adjudicative, the Court [Ninth Circuit] *felt* that the defendants were not seeking to influence a policy-making function; rather they were attempting to undermine a well defined policy with regard to licensing operators by blocking and discouraging access to the governmental agencies." (Emphasis added.)

3. *Sacramento Coca-Cola Bottling Co., Inc. v. Chauffeurs Local 150,* 440 F.2d 1096 (9th Cir. 1971): Plaintiffs alleged that defendants employed threats, duress and other coercive measures to cause State Fair officials to issue a directive forbidding the sale of their product (Coca-Cola) on State Fair grounds. Plaintiff sought recovery, *inter alia,* under the Sherman Act. The lower court

granted defendant's motion for judgment on the pleadings on the basis of *Noerr-Pennington*. The Ninth Circuit reversed reasoning that threats and intimidation were not the kind of communication which *Noerr-Pennington* protects.

CONCLUSION

For all of the reasons set forth herein defendants submit that the complaint fails to state a claim upon which relief can be granted. Therefore the decision of the Court of Appeals should be reversed and the complaint dismissed.

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Dated, August 23, 1971.

(Appendix Follows)

Appendix

RELEVANT PROVISIONS FROM THE U.S. CONSTITUTION, FEDERAL AND STATE STATUTES, AND RULES OF THE INTERSTATE COMMERCE COMMISSION AND CALIFORNIA PUBLIC UTILITIES COMMISSION.

I. U.S. Constitution

First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

II. Sherman Antitrust Act

15 U.S.C. § 1:

Trusts, etc., in restraint of trade illegal.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

15 U.S.C. § 2:

Monopolizing trade a misdemeanor.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, ..."

15 U.S.C. § 4:

Jurisdiction of courts.

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; . . ."

III. Clayton Antitrust Act

15 U.S.C. § 15:

Suits by persons injured; amount of recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. § 25:

Restraining violations.

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, ..."

15 U.S.C. § 26:

Injunctive relief for private parties; exception.

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief

against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

IV. Interstate Commerce Act

49 U.S.C. § 304:

General Duties and Powers of the Commission.

"(a) It shall be the duty of the Commission—

(1) *To regulate common carriers* by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to *continuous and adequate service,* transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment. (Emphasis added.)

* * *

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; . . .

(7) For purposes of the administration of the provisions of this part, to inquire into the management of the business of motor carriers and brokers, and into the management of the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of such persons is related to the management of the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and *may obtain from such carriers and persons such information as the Commission deems necessary* to carry out the provisions of this part; and may transmit to Congress from time to time, such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. . . ." (Emphasis added.)

49 U.S.C. § 305:

Administration. Joint Board. Participation in Hearing. Notice and Opportunity for Intervention.

"(a) The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: *Applications for certificates,* permits, or licenses; the *suspension, change, or revocation of such certificates,* permits, or licenses; applications for the approval and authorization of consolidations, mergers, and acquisitions of control

or operating contracts; . . . The joint board to which any such matter is referred shall be composed solely of one member from each State within which the motor-carrier or brokerage operations involved in such matter are or are proposed to be conducted: *Provided,* That the Commission may designate an examiner or examiners to advise with and assist the joint board under such rules and regulations as it may prescribe. In acting upon matters so referred, joint boards shall be vested with the same rights, duties, powers, and jurisdiction as are hereinbefore vested in members or examiners of the Commission to whom a matter is referred for hearing and the recommendation of an appropriate order thereon: *Provided, however,* That a joint board may, in its discretion, report to the Commission its conclusions upon the evidence received, if any, without a recommended order. Orders recommended by joint boards shall be filed with the Commission, and shall become orders of the Commission and become effective in the same manner, and shall be subject to the same procedure, as provided in the case of orders recommended by members or examiners under section 17. If a joint board to which any matter has been referred shall report its conclusions upon the evidence without a recommended order, such matter shall thereupon be decided by the Commission, giving such weight to such conclusions as in its judgment the evidence may justify.

* * *

(d) So far as may be necessary for the purposes of this part, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts,

agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under part I; and any person subpenaed or testifying in connection with any matter under investigation under this part shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under part I, unless otherwise provided in this part.

(e) In accordance with rules prescribed by the Commission, *reasonable notice shall be afforded,* in connection with any proceeding under this part, *to interested parties* and to the board of any State, or to the governor if there be no board, in which the motor-carrier operations involved in the proceeding are or are proposed to be conducted, *and opportunity for intervention* in any such proceeding *for the purpose of making representations to the Commission or for participating in a hearing,* if a hearing is held, *shall be afforded to all interested parties.* (Emphasis added.)

(f) The Commission is authorized to confer with or to hold joint hearings with any authorities of any State in connection with any matter arising in any proceedings under this part. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities as fully as may be practicable, in the enforcement or administration of any provision of this part. . . ."

49 U.S.C. § 306:

Application for Certificate of Public Convenience and Necessity.

"(a)(1) Except as otherwise provided in this section and in section 310a of this title, no common

carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. . . .

* * *

(6) On and after October 15, 1962 no certificate of public convenience and necessity under this chapter shall be required for operations in interstate or foreign commerce by a common carrier by motor vehicle operating solely within a single State and not controlled by, controlling, or under a common control with any carrier engaged in operations outside such State, if such carrier has obtained from the commission of such State authorized to issue such certificates, a certificate of public convenience and necessity authorizing motor vehicle common carrier operations in intrastate commerce and such certificate recites that it was issued after notice to interested persons through publication in the Federal Register of the filing of the application and of the desire of the applicant also to engage in transportation in interstate and foreign commerce within the limits of the intrastate authority granted, that *reasonable opportunity was afforded interested persons to be heard,* that the State commission has duly considered the question of the proposed interstate and foreign operations and has found that public convenience and necessity require that the carrier authorized to engage in intrastate operations also be authorized to engage in operations in interstate and foreign commerce within limits which do not exceed the scope of the intrastate operations authorized to be conducted.

Such operations in interstate and foreign commerce shall, however, be subject to all other applicable requirements of this Act and the regulations prescribed hereunder. . . ." (Emphasis added.)

49 U.S.C. § 307:

Issuance of Certificate.

"(a) Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. . . .

(b) . . . ."

49 U.S.C. § 308:

Terms and Conditions of Certificate.

(a) Any certificate issued under section 306 and 307 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, *at the time of issuance and from time to time thereafter,* be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public

convenience and necessity *may from time to time* require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 304 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

(b) . . . ." (Emphasis added.)

49 U.S.C. § 312:

Suspension, Change, Revocation and Transfer of Certificates, Permits, and Licenses.

"(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such *certificate,* permit, or license *may, upon application* of the holder thereof, *in the discretion* of the Commission, *be amended or revoked,* in whole or in part, or may *upon complaint, or on the Commission's own initiative,* after notice and hearing, *be suspended, changed, or revoked,* in whole or in part, for wilful failure to comply with any provision of this part, or with any lawful order, rule, or regulation promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof wilfully fails to comply, within a reasonable time, not less than

thirty days, to be fixed by the Commission, with a lawful order made as provided in section 304(c), commanding obedience to the provision of this part, or to the rule or regulation thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license or any application filed pursuant to the provisions of section 306, 309, or 311, or by virtue of the second proviso of section 306 (a) or temporary authority under section 310a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 311 (c), 317 (a), or 318 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder." (Emphasis added.)

"(b) Except as provided in section 5 [relating to combinations and consolidations of carriers] any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe."

V. Interstate Commerce Commission's General Rules of Practice

Rule 39 (49 C.F.R. § 1100.39):

Applications; notice.

"Appropriate notice of the filing of an application will be given by the applicant or by the Commission to the States, to State authorities, or to other persons as may be required by the form or instruction or by the act."

Rule 40 (49 C.F.R. § 1100.40):

Protests against applications.

"(a) *Content.* A protest against the granting of any application shall set forth specifically the grounds upon which it is made and contain a concise statement of the interest of protestant in the proceeding.

(b) *When filed.* Any protest shall be filed with the Commission promptly after the application is filed. If the proceeding be one respecting which the Commission has issued a notice advising the public of the filing of the application, the protest shall be filed within the time specified in such notice. Failure to file a protest shall not prejudice subsequent participation in the proceeding.

(c) *Copies; service.* A protest filed under this section shall be served upon applicant and, unless otherwise specified in the public notice, the original and six copies of the protest shall be filed with the Commission.

(d) *When rule disregarded.* An application may be set for hearing *without awaiting the filing of a protest or of a reply thereto,* and also may be disposed of without regard to the prior paragraphs of this section unless the act provides that the particular application may be granted only upon hearing." (Emphasis added.)

Rule 74 (49 C.F.R. § 1100.74):

Witness examination; order of procedure.

"Witnesses will be orally examined under oath before the officer unless their testimony is taken by deposition or the facts are presented to the Commission in the manner provided under modified or shortened procedure. In formal complaint, application, and

investigation proceedings complainant, applicant and respondent, respectively, shall open and close at the hearing, except at further hearings granted on petition the petitioner requesting further hearing shall open and close; and except, further, that parties other than the respondent shall open and close in investigations in which the burden of proof is not upon the respondent. Intervenors shall follow the party in whose behalf the intervention is made. The foregoing order of presentation may be varied by the officer, who also shall designate the order of presentation in any other type of proceeding, of any other party to any proceeding, or of parties to several proceedings being heard upon a consolidated record."

Rule 76 (49 C.F.R. § 1100.76):

Evidence; cumulative restriction.

"It shall be the duty of the officer before whom any proceeding is being heard *to limit the number of witnesses whose testimony may be merely cumulative*: And in order to enforce this section, the officer may require a clear statement on the record of the nature of the testimony to be given by any witness proffered." (Emphasis added.)

Rule 96 (49 C.F.R. § 1100.96):

Exceptions to officer's report.

"(a) *Generally.* Exceptions to the officer's report with respect to statements of fact or matters of law must be specific and must be stated and numbered separately. If exception is taken to conclusions in the report, the points relied upon to support the exception must be stated and numbered separately. When exception is taken to a statement of fact contained in the report, reference also must be made to the page

or part of the record relied upon to support the exception and a corrected statement must be incorporated.

(b) *When filed.* Within 30 days after service of the officer's report, any party may file and serve exceptions thereto and reasons in support thereof. Replies may be served and filed as provided in Rule 23. In any case the Commission may, in its discretion, upon notice to the parties reduce or extend the time for filing exceptions or replies.

(c) *Exceptions and request for hearing by person not party.* If the proceeding is one in which no oral hearing has been held, any person not a party to the proceeding, but having an interest therein, may file and serve upon applicant, or complainant, as the case may be, exceptions to the officer's report and reasons in support thereof. A request for hearing may be included therein but the exceptions need not include a request for hearing if none is deemed necessary."

Rule 101 (49 C.F.R. § 1100.101):

Petitions for rehearing, reargument, or reconsideration.

"(a) *In general.* (1) A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.

(2) *Administrative finality of division and employee board decisions.* All decisions, orders, or requirements of a division of the Commission in any proceeding shall be considered administratively final,

except those involving issues of general transportation importance, those wherein the division reverses, changes, or modifies a prior decision by a hearing officer, and those wherein the initial decision is made by a division; *Provided, however,* That this subparagraph shall not preclude the seasonable filing of a petition for relief under paragraphs (b) and (c) of this section, to be considered and disposed of by the division or appellate division which made the decision, order, or requirement as to which relief is sought. Decisions of an employee board, whether original or on review, are not administratively final. Such employee board decisions shall be subject to review by an appropriate appellate division of the Commission upon the filing of a timely petition in accordance with these rules of practice.

(3) *Limitations on petitions for review of division decisions.* Pursuant to authority granted in section 17(6) of the Interstate Commerce Act, the right to apply to the entire Commission for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division of the Commission in any proceedings shall be limited and restricted to those proceedings in which the entire Commission, on its own motion, determines and announces that an issue of general transportation importance is involved. In proceedings in which no such announcement has been made, but in which a division reverses, changes, or modifies a prior decision by a hearing officer or where the initial decision is made by a division, a petition to the same division for rehearing, reargument, or reconsideration of its decision will be permitted and will be considered and disposed of by such division in an appellate capacity and with administrative finality.

(4) *Petitions seeking a finding that an issue of general transportation importance is involved; 3-page limitation; time for filing; no reply permitted.* In any proceeding which has involved the taking of evidence at oral hearing or by modified procedure in which the Commission has not noted the presence of an issue of general transportation importance, any party may, within 15 days after the service of a final decision, order, or requirement of a division or appellate division, as to which the filing of a petition for rehearing, reargument, or reconsideration is not permitted, file a petition requesting the Commission to find on its own motion that the proceeding is one involving an issue of general transportation importance. Any petition seeking such a finding shall not be considered an application for rehearing, reargument, or reconsideration within the meaning of section 17 of the act and shall not exceed 3 pages. No reply thereto may be filed and the ruling thereon will be final. Petitions seeking the relief specifically covered herein will not be entertained at any other stage of the proceeding.

(5) *Copies of petitions and replies.* In cases in which it has been determined and announced that an issue of general transportation importance is involved, there shall be furnished for the use of the Commission the original and 14 copies of each petition filed under this section and of replies to such petitions. A like number of copies shall be furnished of petitions seeking a finding that the proceeding involves an issue of general transportation importance. In all other cases, the original and 7 copies of such petitions and replies shall be furnished for the use of the Commission.

(b) *Rehearing or further hearing.* When in a petition filed under this section opportunity is sought

to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

(c) *Modification of effective date.* A petition under this section seeking only modification of the effective date of a decision, order, or requirement, or in the period of notice, or other period or date prescribed therein, must be filed seasonably, except that, in case of unforeseen emergency satisfactorily shown by petitioner, such relief may be sought informally by telegram or otherwise, provided like notice is simultaneously communicated to all parties of record.

(d) *Reconsideration.* If relief under this section other than under paragraphs (b) and (c) is sought, the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in Rule 96(a), as should also any substitute finding or other substitute requirement desired by petitioner.

(e) *Time for filing.* Except for good cause shown, and upon leave granted, petitions under this section must be filed within 30 days after the date of service of a decision or order, except as otherwise provided in the special rules of practice.

(f) *Successive petitions on same grounds, not entertained.* A successive petition under this section submitted by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission will not be entertained.

(g) *Petitions for reconsideration of appellate division decisions on review of board decisions.* When

an appellate division has denied a petition seeking a reversal, change, or modification of a determination whether original, or on review by a board of employees, any further petition for reconsideration by the same party or parties upon substantially the same grounds will not be entertained. If in the consideration of such a petition, however, by the appellate division, the previous determination of the board of employees has been reversed, changed, or modified, a further petition may be filed by any party to the proceeding adversely affected by the decision of the appellate division, within the time specified in paragraph (e) of this section, and the petition will be considered and disposed of by the same appellate division which passed upon the initial petition."

Rule 247 (49 C.F.R. § 1100.247):

Special Rules for Applications for Certificates of Public Convenience and Necessity.

"(d) *Protests and request for hearing.* (1) Protests to the granting of an application shall be filed with the Commission within 30 days after the date notice of the filing of the application is published in the FEDERAL REGISTER. A protest filed under these rules shall certify that it has been served upon applicant's representative (or applicant, if no practitioner representing him is named in the notice of filing published in the FEDERAL REGISTER). Unless otherwise specified in the published notice, the original and one copy of the protest shall be filed with the Commission. Protests not in reasonable compliance with the requirements of these rules may be rejected in the discretion of the Commission.

(2) Failure seasonably to file a protest will be construed as a waiver of opposition and participation in the proceeding.

(3) A protest against any application shall set forth specifically the grounds upon which it is made and contain *a detailed statement of the protestant's interest in the proceeding (including a copy of the specific portions of its authority which protestant believes to be in conflict with that sought in the application, and describing in detail the method (whether by joinder, interline, or other means) by which protestant would use such authority to provide all or part of the service proposed),* shall request an oral hearing if one is desired, and shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased generally. Protests phrased in general terms and not complying with these specifications may be rejected. (Emphasis added.)

(4) Any request for an oral hearing shall be supported by a specific explanation as to why the evidence to be presented cannot reasonably be submitted in the form of affidavits, and shall set forth the number of witnesses which would be presented by the protestant and an estimate of the hearing time required for such presentation. Protests embracing a request for oral hearing shall contain the following certification without further qualification:

> The undersigned hereby certifies that, if an oral hearing is held, protestant(s) will appear and present evidence of protestant(s) own operations and particular interest(s) in the outcome of this application unless this application is amended so as to eliminate the interest(s) of protestant(s) as set forth in this protest.

(5) Where a person has a *limited interest* in an application, *which possibly could be eliminated by a restrictive amendment to the application;* which

amendment must be acceptable to the Commission, it may also include in a protest filed in conformity with this paragraph *an offer to withdraw the protest* in the event of acceptance by applicant and the Commission of such amendment." (Emphasis added.)

VI. Administrative Procedure Act (as codified prior to 1966 amendments)

5 U.S.C. § 1008:

Hearings.

". . . .

"(b) Hearing powers—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act. . . ."

VII. California Public Utilities Code

§ 701:

General Authority.

"The commission may supervise and regulate every public utility [including highway common carriers] in the State and may do all things, whether specifically designated in this part or in addition thereto,

which are necessary and convenient in the exercise of such power and jurisdiction."

§ 1061:

Highway Common Carriers.

"No highway common carrier . . . shall operate or cause to be operated any auto truck . . . for the transportation of property as a common carrier for compensation on any public highway in this State except in accordance with the provisions of this part [the Public Utilities Act]."

§ 1062:

Commission Regulation of Common Carriers.

"The commission may: (a) supervise and regulate every highway common carrier . . . in this State; (b) fix the rates . . . and rules of each such carrier; (c) regulate the accounts and service of each such carrier . . . ; (d) supervise and regulate such carriers in all other matters affecting the relationship between them and the shipping public. The commission, by general order or otherwise, may prescribe rules applicable to any and all highway common carriers. . . ."

§ 1063:

Certificate of convenience and necessity; transfer of franchise.

"No highway common carrier, . . . shall begin to operate any autotruck, or other self-propelled vehicle, for the transportation of property for compensation on any public highway in this state without first having obtained from the commission a certificate declaring that public convenience and necessity re-

quire such operation. . . . Any right, privilege, franchise, or permit held, owned or obtained by any highway common carrier . . . may be sold, leased, transferred, or inherited as other property, only upon authorization by the commission."

§ 1064:

Issuance of Certificate.

". . . the commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by the certificate such terms and conditions as, in its judgment, the public convenience and necessity require. . . ."

§ 1069:

Application for Certificate.

"An applicant shall submit his written verified application to the commission. The application shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the commission requires."

§ 1070:

Suspension, Revocation, Suspension of Certificate.

"The commission may at any time for a good cause suspend, and upon notice to the . . . grantee of any certificate, and opportunity to be heard, revoke, alter, or amend any such operative right or certificate. . . ."

§ 1071:

Hearings; Rules of Practice and Procedure.

"All hearings, investigations, and proceedings shall be governed by this part [Public Utilities Act] and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission."

§ 1731:

Rehearing.

"After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed application to the commission for a rehearing before the effective date of the order or decision, or, if the commission fixes a date earlier than the 10th day after issuance as the effective date of the order or decision, unless the corporation or person has filed such application for rehearing before the 10th day after the date of issuance."

§ 1756:

Judicial Review.

"Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified."

§ 1757:

Scope of Judicial Review.

"No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination."

§ 1758:

Appearances Allowed in Review Proceeding.

"The commission and each party to the action or proceeding before the commission may appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article."

VIII. California Public Utilities Commission's Rules of Practice and Procedure

Rule 21:

Common Carrier Certificates.

". . . [A]pplications for certificates . . . shall contain the following data . . . :

(f) *The names of all common carriers with which the proposed service is likely to compete, and a certification that a copy of the application has been served upon or mailed to each such carrier named.* Applications shall also name all other parties to whom copies of the application will be mailed. Applicants shall promptly notify the Commission of such mailing. Applicants shall also mail copies to such additional parties and within such times as may be designated by the Commission. . . ." (Emphasis added.)

Rule 37:

Additional Requirements for Applications to Transfer Common Carrier Certificates.

". . . the application shall show the following data:

(a) The territory or points served, the nature of the service, the effect of the transaction upon present operations or rights of the applicant carrier, *the names of all common carriers with which the proposed service is likely to compete, and a certification that a copy of the application has been served upon or mailed to each such carrier named. . . .*" (Emphasis added.)

Rule 52:

Publication of Notice of Hearing.

"In . . . [certificate applications], applicant shall provide such notice to the public as the assigned Commissioner or Examiner may designate for such proceeding. . . ."

Rule 54:

Participation Without Intervention.

"In an investigation or application proceeding, or in such a proceeding when heard on a consolidated record with a complaint proceeding, *an appearance may be entered* at the hearing without filing a pleading, if no affirmative relief is sought, *if there is full disclosure* of the persons or entities in whose behalf the appearance is to be entered, *if the interest* of such persons or entities in the proceeding *and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent* to the issues already presented and any right to broaden them unduly is disclaimed. (Emphasis added.)

A person or entity in whose behalf an appearance is entered in this manner becomes a party to and *may participate* in the proceeding *to the degree indicated by the presiding officer.*" (Emphasis added.)

Rule 58:

Limiting Number of Witnesses and Testimony.

"To avoid unnecessary cumulative evidence, the presiding officer may *limit the number of witnesses* or the *time for testimony upon a particular issue.*" (Emphasis added.)

Rule 62:

Designation.

"When evidence is to be taken in a proceeding before the Commission, one or more of the Commissioners, or an Examiner, may preside at the hearing."

Rule 63:

Authority.

"The presiding officer may set hearings and *control the course thereof;* administer oaths; issue subpoenas; receive evidence; hold appropriate conferences before or during hearings; rule upon all objections or motions which do not involve final determination of proceedings; receive offers of proof; hear argument; and fix the time for the filing of briefs. He may take such other action as may be necessary and appropriate to the discharge of his duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission." (Emphasis added.)

Rule 75:

Briefs.

"The presiding officer may fix the time for the filing of briefs. Concurrent briefs are preferable. Exhibits may be reproduced in an appendix to a brief. A brief of more than twenty pages shall contain a subject index and table of authorities. Requests for extension of time to file briefs must be made to the Commission in writing, and a copy thereof served upon or mailed to the other parties to the proceeding. Ordinarily, when a matter has been submitted on concurrent briefs, extensions will not be granted unless a stipulation is filed with the Commission. The original of each brief shall contain a certification that copies have been served upon or mailed to each party or his attorney."

Rule 76:

Oral Argument.

"If the Commission or the presiding officer is of the opinion that the complexity or importance of the issues so warrant, the Commission or the presiding officer may direct or permit the presentation of oral argument."

MOTION FILED

OCT 27 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-92

(PREVIOUSLY OCTOBER TERM, 1970, No. 1419)

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners*,

vs.

TRUCKING UNLIMITED, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF FOR LANDMARKS HOLDING CORPORATION, ET AL., AS *AMICI CURIAE*

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Dated October 28, 1971

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The above-named individuals and corporation hereby respectfully move for leave to file a brief annexed hereto, as *amici curiae*, in this case. Applicants requested the consent of Petitioners and Respondents to file a brief as *amici curiae*. Respondents, Trucking Unlimited, et al., granted their consent. Petitioners refused their consent.

The case now before this Court will almost certainly control the outcome of a private, treble damage antitrust action in which Applicants are plaintiffs. Applicants' case involves many of the same basic issues as those presented by the case now before this Court. There are, however, significant differences between applicants' case and this one, and applicants rest their motion for leave to file a brief as *amici curiae* upon the differences between the cases as well as their similarities. We wish to present arguments and viewpoints on the basic issues which the parties themselves will probably not present.

The present case poses issues of enormous importance for the future of antitrust policy. This Court's resolution of those issues may lay down the guidelines for a developing field of law. What is at stake is the ability of conspirators or would-be monopolists to abuse governmental processes in order to destroy competitors or create artificial barriers to their entry into concentrated markets. The present case displays one variety of such an attempt, but there are many others, some in litigation but most not. The parties to this case will necessarily focus upon the allegations of Respondents' complaint. Applicants believe that it will be of assistance to this Court, in framing the general guidelines that will control the development of this entire field of law, to have before it a discussion of other types of cases involving the abuse of governmental processes for anti-competitive purposes. Indeed, one of the precedents central to this and many other similar controversies, *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961), itself stresses the importance to governmental decision makers of a flow of information and views provided by persons with an interest in the outcome of the proceedings. Applicants hope to serve that function here. We respectfully suggest that such a function is particularly appropriate in a landmark case such as this promises to be, for, as this Court noted in *White Motor*

Co. v. *United States*, 372 U.S. 253 (1963), the framing of general rules in a limited factual context is inevitably a delicate and troublesome problem. A brief by *amici curiae*, if more general than those filed by the immediate parties, can assist in this task by adding to the views and information presented.

Applicants are plaintiffs in *Landmarks Holding Corporation et al.* v. *Hamden Mart, Inc., et al.*, a Sherman Act treble damage action now pending in the United States District Court for the District of Connecticut. Should this Court render an opinion in the case now before it applying generally to attempts to abuse governmental processes in order to stifle competition, that opinion would almost certainly control the outcome of Applicants' litigation. Applicants' complaint, based upon Sections 1 and 2 of the Sherman Act, alleges that Applicants are attempting to have land in Hamden, Connecticut rezoned so that it may be used for a regional shopping center instead of light industry. Applicants, who own the land, will own a one-half interest in this regional shopping center and receive one-half its net revenues.

Applicants allege in their complaint that two nearby shopping centers have restrained and monopolized trade by abusing the processes of the Connecticut Courts and of the Hamden Planning and Zoning Commission in an effort to defeat Applicants' entry into their market area. The defendant shopping centers are of the outmoded "strip" type while Applicants and their partner intend to erect and operate a center containing three major department stores and a two-level, fully-enclosed, air-conditioned, modern shopping mall. The defendant shopping centers, aware that Applicants' shopping center would be a formidable rival, have abused and continue to abuse the processes of the courts and zoning boards to delay the appearance of competition.

The Town of Hamden endorses Applicants' plans to establish a regional shopping center because of its beneficial effect upon employment in the area and the additional tax revenue it would provide. The Hamden zoning board first ruled against the zone reclassification and then ruled in favor of it. Defendant shopping centers have appealed the zoning board's determination to the state courts. Applicants' complaint alleges that the defendant shopping centers took this appeal, and other appeals from related administrative determinations, well knowing that they had no lawful right to appeal or, indeed, to oppose the zone reclassification before the zoning board. The complaint further alleges that the defendant shopping centers supported, directed, and subsidized residents of Hamden in oppositions to the zone reclassification before the zoning board and in appeals to the Connecticut courts from decisions favorable to Applicants. The complaint makes certain of these citizens defendants because they knowingly became the instruments of an illegal conspiracy but asks no relief against them other than that they stop receiving subsidies from the defendant shopping centers. Applicants allege that the defendant shopping centers took these and other actions solely to prevent competition, raise Applicants' costs, inflict direct injury upon them, and harass, delay, and defeat them in their effort to compete with defendant shopping centers.

Applicants' case is thus parallel in many respects to the case now before this Court, but there are significant differences between the two. A major difference is that the administrative tribunals involved in the present case had some responsibility to determine the desirable amount of competition in trucking. No governmental body involved in Applicants' case had any such responsibility or authority. Neither the zoning board nor the Connecticut courts is empowered to consider competition. In fact, Connecticut law clearly for-

bids the consideration of that factor in zoning determinations. If Applicants are ultimately defeated in their efforts to compete by the stratagems of the defendant shopping centers, it will not be because any governmental agency has decided that competition is undesirable. It will be entirely because processes designed for other purposes have been abused, because a sham litigation has delayed Applicants until their contracts lapse and the project has become too expensive to be commercially feasible.

Applicants' predicament is by no means unique. Zoning processes are regularly abused by persons who would restrain competition at the expense of consumers. In fact, Applicants allege and expect to be able to show that defendants in their case have made a regular practice of misusing zoning processes for this purpose, both in the shopping center business and in other industries. Applicants' case is the first we know of that attempts to prevent the deliberate infliction of delay and expense through sham oppositions and appeals by applying the federal antitrust laws. We do know, however, that a case is pending under the common law of the State of New York attempting to recover for the sham use of zoning procedures to preclude new competition in motion picture exhibition. Other governmental agencies are also often misused. The full extent of these low visibility monopolizations in local and regional markets has yet to come to light, but the spate of litigation in lower courts, as shown by the cases cited in the briefs filed by Petitioners and Respondents, begins to suggest the seriousness of the problem. A wide variety of governmental agencies are misused by a wide variety of techniques.

Wherefore, the Applicants respectfully pray that they be accorded permission to file a brief *amici curiae* in order to present arguments and viewpoints on the matters involved

in this case which the parties themselves will probably not present.

Respectfully submitted,

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OPINIONS BELOW

The opinion of the Court of Appeals (Jt. App. 46-59), together with the dissenting opinion of Circuit Judge Hamlin (Jt. App. 60, 61), is reported at 432 F.2d 755 (1970).

The opinion of the District Court (Jt. App. 22-43) is reported at 1967 Trade Cas. ¶72,298 (N.D. Cal. 1967).

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1970 (Jt. App. 62). On December 22, 1970, by order of Mr. Justice Blackmun, the time within which to file a petition for a writ of certiorari was extended to February 18, 1971 (Jt. App. 63). On February 9, 1971, by order of Mr. Justice Douglas, the time within which to file a petition for a writ of certiorari was further extended to March 4, 1971 (Jt. App. 64). The petition was filed March 4, 1971, and was granted June 1, 1971. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTION PRESENTED

Under what circumstances are conspirators or would-be monopolists liable under the Sherman Act for abusing governmental processes in order to stifle competition by inflicting injury upon competitors?

INTEREST OF THE *AMICI*

Amici are businessmen and a corporation who separately engage in a wide variety of business activities. They have come together as partners in an effort to establish a regional shopping center on land they own in Hamden, Connecticut. They have entered into an agreement with The May Shopping Centers, Inc., to construct the shopping center, and *amici* will be one-half owners and receive one-half of the net revenues.

Amici are plaintiffs in an action laid under the Sherman Act which alleges that their efforts to establish a shopping center have been made more expensive, and may be defeated

by delay wrongfully inflicted upon them through competitive shopping centers' misuse of the Connecticut courts and of a local zoning board. The Complaint alleges that the competitive shopping centers' opposition in these tribunals has been a sham, clearly without legal basis, and intended solely to delay *amici's* entry into the market.

Amici are vitally interested in their freedom to operate their business and to compete freely. They have no objection to any valid governmental regulations that control or inhibit their right to compete. But they believe it essential that governmental processes designed for other purposes not be abused by sham actions whose sole purpose is to suppress competition.

STATEMENT

The pleadings and lower-court proceedings are detailed in the briefs of the parties, and we restrict ourselves here to a summary statement.

Respondents, plaintiffs below, filed a complaint under Section 2 of the Sherman Act on May 6, 1966, in the federal District Court for the Northern District of California. The complaint was amended on February 20, 1967. Petitioners, defendants below, filed a motion to dismiss on the ground that their alleged conduct was immunized by the *Noerr-Pennington* doctrine. The District Court granted the motion on October 5, 1970, the Court of Appeals for the Ninth Circuit reversed, holding by a 2 to 1 vote that Respondents' complaint stated a valid claim for relief under the Sherman Act.

Respondents are fifteen trucking firms operating in the State of California. Petitioners are nineteen of the largest trucking firms in the state. Respondents' complaint alleges that Petitioners, discomfited by the increasing competition of smaller truckers, entered into a combination and conspiracy

to inhibit and deter that competition. They banded together to create a joint trust fund that would be used to oppose all applications for operating rights by smaller trucking firms. That opposition was to be pursued before all available courts as well as before the California Public Utilities Commission (PUC) and the Interstate Commerce Commission (ICC). Petitioners agreed to pursue their oppositions regardless of the merits of any application and regardless of the absence of any basis for opposition. To complete the intended terroristic effect of their scheme, Petitioners warned the smaller truckers that they had put this plan in operation and that the smaller truckers could avoid the costs that would be inflicted upon them only by henceforward refraining from asking for operating rights.

SUMMARY OF ARGUMENT

The complaint in this case alleges one of the most dangerous and increasingly frequent forms of business predation: the deliberate abuse of governmental procedures by conspirators for the purpose of suppressing the competition of smaller rivals. The criteria established by this Court will determine the effectiveness of antitrust policy for very important segments of the economy.

Respondents' complaint, we believe, clearly states a valid claim for relief under the Sherman Act. The decision of the Court of Appeals for the Ninth Circuit should, therefore, be affirmed and the case returned to the District Court for trial.

Because their motion to dismiss necessarily admits all the facts pleaded, Petitioners' argument here and below has been that constitutional considerations give them immunity from antitrust liability for a blatant attempt to suppress the rivalry of smaller trucking firms. There is no doubt that otherwise Respondents' complaint accuses Petitioners of the requisite

power, intention to exclude competitors, and predatory acts to constitute the clearest violation of Section 2 of the Sherman Act.

The controlling precedent, we believe, is *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), in which this Court attached Sherman Act liability to a business predator who knowingly asserted a false patent claim in the courts in order to drive rivals from the field it coveted. Petitioners, according to the complaint, have similarly agreed to, and have, asserted baseless oppositions to smaller trucking companies' applications for operating rights. These baseless oppositions occurred before regulatory tribunals and before courts. In all important respects, the parallel between this case and the *Walker Process Equipment* case is exact.

Petitioners attempt to avoid the force of this argument, and thus to avoid a trial upon the merits of Respondents' claim, by claiming an immunity for their predation under *Eastern Railroad Presidents Conference* v. *Noerr*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). These cases created an immunity from Sherman Act liability, indeed from any legal liability, for those who attempt by a political campaign to influence elected representatives to pass legislation favorable to their interests or who seek to have executive officers take decisions within their lawful discretion. While we believe those decisions to be plainly correct, we also think them clearly irrelevant to the case framed by Respondents' complaint.

This case does not involve Sherman Act liability alone. The *Noerr* and *Pennington* decisions rest upon general constitutional and policy considerations. The immunity they recognize, where it applies, bars all governmental regulation. It is quite clear that some attempts to use the processes of

government are constitutionally protected. No legislature, for example, could make it criminal for citizens peaceably to petiton government for relief of any grievance. But it is equally clear that some attempts to use the processes of government for private gain may be punished, and indeed must be punished if the integrity of those processes is to be preserved. It is imperative, for example, that courts have the power to punish for deliberate perjury or the knowing assertion of baseless claims and that legislatures have the power to prohibit perjury before their investigative committees.

Between these extremes of propriety and impropriety in the use of governmental procedures lies a long spectrum. Our analysis convinces us that no single, sharp dividing line can be drawn separating the licit from the illicit. The spectrum presented by the cases must be calibrated according to several fundamental considerations. We suggest that the following five considerations are appropriate to govern the issue of liability for attempts to use or abuse the processes of government.

(1) *The intent of the parties.* Liability will usually attach only if the parties attempting to use government have a specific intent which would be unlawful in other contexts: e.g., the intent to suppress competition by the destruction or harassment of business rivals.

(2) *The means employed.* Regardless of intent, a party can be held liable only if he employs means to invoke governmental action that are reprehensible: e.g., the knowing use of perjured testimony before an administrative agency; the knowing advancement of baseless claims before a court of law; the bribery of a law enforcement official.

(3) *The character of governmental process by which decisions are made.* Immunity exists when the process is open

and explicitly political, as in the *Noerr* case. But as the process of governmental information gathering and decision becomes more formalized, moves more toward the model of the judicial process, the immunity correspondingly begins to narrow.

(4) *The character of the governmental decision to be made.* Immunity is broadest when the official or governmental body has discretion to act in the field but it narrows and may disappear when the parties charged have influenced an agent of government to act knowingly outside its lawful authority or when the decision-making body's processes are invoked, seemingly for one purpose, but actually merely to inflict injury through expense and delay.

(5) *The degree to which the process and decision focus upon the formulation of general rules or upon the rights and liabilities of particular parties.* Immunity is properly broader when the framing of general rules is the object of any governmental process than when the force of government is to be brought to bear upon specific parties.

ARGUMENT

I.

THE VALIDITY OF RESPONDENTS' COMPLAINT IS CRUCIAL TO AN EFFECTIVE ANTITRUST POLICY

Predation by abuse of judicial and governmental procedures presents an increasingly dangerous threat to competition in America and to the viability of federal antitrust policy. Predation by such means fits precisely within the definition of "monopolizing" intended by the framers of the Sherman Act. When the Judiciary Committee's draft, which became the law, was brought before the Senate a question was raised as to its meaning. Senator Kenna (D., West Virginia) asked

whether Section 2 would punish a man who got all the business in his line "by his own skill and energy, by the propriety of his conduct generally." He was answered in the negative by Senator Edmunds (R., Vermont) and Senator Hoar (R., Massachusetts) who had taken active parts in drafting the bill. 21 Cong. Rec. 3151-3152 (1890).

Senator Hoar told the Senate that monopolizing, the activity made a crime by Section 2, was "the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him." 21 Cong. Rec. 3152 (1890). Monopolizing, in a word, consists of the use of tactics which preclude a fair test of efficiency in the market place. There could be no more accurate description of the abuse of governmental procedures to prevent a would-be competitor from even reaching the market place.

As new forms of monopolization by predation have appeared this Court has been alert to stamp them out, applying the Sherman Act or related statutes embodying the same policy. Local price wars launched to suppress competition have long been illegal. *Standard Oil Co. (N.J.)* v. *United States*, 221 U.S. 1 (1911); *United States* v. *National Dairy Products Co.*, 372 U.S. 29 (1963) (Section 3 of the Robinson-Patman Act). The law has been similarly strict with group boycotts aimed at injuring or destroying a rival or class of rivals. *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Even a single trader's refusal to sell is within Section 2 of the Sherman Act if it springs from a predatory design. *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951). It may safely be said that the Sherman Act and related antitrust statutes are capable of discovering and punishing any business conduct which is monopolistic in intent and effect.

A new and peculiarly deadly form of business predation is now rampant and the law is just beginning to catch up with it. In the early years of antitrust policy there were few opportunities for monopolization through misuse of governmental agencies because governmental regulation was not as pervasive as it is today. The last several decades have witnessed an enormous proliferation of regulatory and licensing agencies at every level of government, federal, state, and local. In order to enter the market and vie for the consumers' favor businesses of all types must gain various types of approval from governmental agencies, departments, and officials. Licensing authorities, planning boards, zoning commissions, health departments, building inspectors, public utilities commissions, and many other bodies and officials control and qualify the would-be competitors access to the market place.

The modern profusion of such governmental authorities protects the public in many ways but also offers limitless possibilities for abuse by the sophisticated and powerful. There can be no antitrust objection when a business opposes entry of a rival before an agency charged with determining whether or not additional competition in that area is consistent with the public interest. But there is an antitrust objection when the powerful business puts up a baseless opposition in bad faith for the sole purpose of harassing, delaying, and thereby weakening or destroying his rival. There is all the more objection when businesses combine to lend each other strength in order to put up baseless oppositions to any and all competition. And there is a most acute objection when powerful businesses use governmental agencies that have no responsibility or authority to decide the desirability of competition for the purpose of destroying competition. An established monopolist who, for example, bribed local building inspectors needlessly to harass and delay the construction of a competitor's factory would be misusing governmental procedures to

stifle competition in a way that the antitrust laws prohibit.

As regulation of all types grows, there arises a corresponding need to ensure that it is not used for purposes foreign to its objectives and to frustrate the policy of the antitrust laws. Otherwise, the largest companies possessing the largest cash reserves and the most sophisticated legal counsel can band together and face smaller rivals with the prospect of protracted and expensive litigation as the price of reaching the market. This raises an effective, artificial barrier to entry. The smaller companies, the intended victims, are usually not united or sophisticated. Each knows that it will have to bear alone the heavy costs and inconveniences of litigation. The result, inevitably, is that many will decide not to challenge the combination.

What makes this form of predation particularly insidious is that the tactic has had relatively low antitrust visibility. The enforcement agencies have tended to look for more traditional modes of foreclosure and exclusion. Since much of this predation occurs at local levels through the misuse of state and municipal procedures the victims are often small businesses with very little knowledge of possible antitrust protection. Too often the legally unsophisticated small businessman, faced with opposition before a local court or agency, thinks only of the contest in that arena, not realizing that an obviously sham opposition, as in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), provides him with the basis for an antitrust claim in another forum.

We have, of course, no way of estimating precisely how much competition is crippled or stifled each year through the abuse of governmental processes. The number of cases beginning to arise in this field, and considerable practical experience in various business affairs, leads us to believe that the

aggregate annual loss to consumers must be enormous. It is crucial that antitrust enforcement catch up with this means of monopolization. We cannot believe that it is impotent to do so.

II.

THE SWEEP OF PETITIONERS' CLAIM OF IMMUNITY DEMONSTRATES ITS INVALDITY

The allegations of Respondents' complaint force Petitioners to make an impossibly broad claim of immunity in order to avoid trial. Petitioners, it is alleged, agreed to fight in advance every application for trucking operating rights regardless of the merits of any application or the absence of colorable grounds for opposition. It is, therefore, clear that Petitioners are charged with knowledge that they would be advancing baseless claims before the courts as well as the PUC and the ICC, just as the predator in the *Walker Process Equipment* case knew that it was advancing a baseless patent claim against its rival. War by fraudulent litigation was to be pursued without limit. The complaint, we submit, clearly states a valid claim for relief under the Sherman Act.

Petitioners' brief before this Court claims an extraordinarily broad immunity for their action. They seek antitrust sanctuary on the ingenious theory that their predation was a "political expression" protected by the First Amendment to the Constitution. That characterization of their behavior has at least the merit of boldness if not of candor and plausibility. It is important to realize the full sweep of the immunity they necessarily claim in order to avoid trial on the allegations of the complaint, for it will be seen that an immunity of such scope would be crippling to the legitimate protection by government of its own processes.

Petitioners are charged with the deliberate misuse of judicial and administrative processes for the purpose of inflicting ruinous expense and delay upon smaller rivals. The misuse alleged involves, among other things, an agreement in advance to assert and pursue to the limit baseless oppositions to applications for operating rights. The immunity they claim is, when analyzed, based entirely upon constitutional rights. That means the immunity would not be limited to a sanctuary from Sherman Act liability. No government, federal or state, could in any way regulate their conduct. The ICC and the PUC would themselves be helpless to deny Petitioners a right to be heard in any application proceeding whatsoever. Petitioners' claim of immunity would, it is important to realize, wipe out the law established by this Court in the *Walker Process Equipment* case, erase all state law concerning the tort of malicious litigation, and deny the power of any agency of government to set limits to intervention in judicial or administrative proceedings.

To illustrate the sweep of the claim Petitioners ask this Court to sustain in order to avoid a trial, we shall suppose a parallel case.

Imagine that the largest law firms of a particular state, feeling the pressure of competition from smaller firms and individual practitioners, meet and agree upon a plan like Petitioners'. They establish a joint trust fund fed by monthly contributions based upon their respective gross billings to clients. The firms then send a circular to all law schools in the nation announcing that they intend to oppose every applicant for admission to the bar of that state before the bar examiners, the character and fitness committees, and all reviewing courts, and that they intend to do so regardless of the merits of any individual's case.

The plan would certainly deter young men and women from

seeking to practice law in that state. Can it possibly be true that no state law, judicial order, or committee ruling can interfere with such a course of conduct because it is a "form of political expression" and hence protected by the Fourteenth Amendment's incorporation of the policy of the First Amendment? Could the conspirator law firms gain total immunity by pointing out that in the particular state the bar examiners were entitled to consider, among other things, the number of applicants that it was desirable to admit in any particular year, or that the character and fitness committees could set standards?

A constitutional immunity does not merely affect the application of the Sherman Act, it defeats the application of any governmental power. Petitioners' claim would mean that the state is powerless to forbid the law firms in our hypothetical from fighting every candidate for admission through the courts as well as the committees of the bars, and that the state is impotent to prevent the issuance of threats of protracted litigation to every potential applicant for admission to the bar.

Petitioners are forced to make their claim of immunity so absurdly broad in order to avoid a trial on Respondents' complaint because the features of the case now before this Court are identical to the hypothetical. If it is true that government is powerless to prevent misuses of its processes for ulterior motives in cases such as this, then a very effective way has been discovered to suppress competition with absolute immunity. The sophisticated, powerful, and affluent will be able to prevent the lawful activities of others, even though they secure no official approval, simply by raising the costs of the activities to prohibitive levels.

We shall attempt to show that no case decided by this Court and no constitutional or policy considerations either compel or justify any such immunity.

III.

THIS COURT'S DECISIONS UPHOLD THE VALIDITY OF RESPONDENTS' COMPLAINT

Respondents' complaint alleges a classic attempt to monopolize and monopolization. The allegations disclose a combination and conspiracy involving business predators with the requisite power and intention to exclude competition, and the commission of acts designed and effective to eliminate competition. These are the elements of an offense under Section 2 of the Sherman Act and have been at least since *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911). There could be no doubt in any one's mind that the complaint here states a valid claim for relief but for the single fact that the monopolization was made effective through litigation.

Any doubt that might once have been entertained on that ground was laid to rest by this Court's decision in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). That case is precisely analogous to this. There the original plaintiff, Food Machinery, filed suit against Walker for infringement of a patent covering knee action swing diffusers used in aeration equipment for sewage treatment systems. After discovery, Food Machinery moved to dismiss its complaint because the patent had expired, but Walker amended its counterclaim for a declaratory judgment that the patent was invalid to state instead a claim under Section 2 of the Sherman Act. The Sherman Act claim was that Food Machinery had illegally monopolized commerce by maintaining and enforcing a patent obtained by fraud on the Patent Office. Upon Food Machinery's motion to dismiss, both lower courts held that the counterclaim failed to state a claim upon which relief could be granted.

This Court reversed, holding that "the enforcement of a patent procured by fraud on the Patent Office may be viola-

tive of §2 of the Sherman Act provided the other elements necessary to §2 case are present." 382 U.S. at 174. The crux of the case was the knowing assertion of a baseless claim in court for the purpose of injuring a competitor.

Petitioners' brief here attempts to brush the *Walker* case under the rug by treating it as if this Court merely held that a fraud on the Patent Office is illegal. But that is a complete misreading of the case. The significance of the fraud on the Patent Office was quite different. Food Machinery attempted to argue that the counterclaim was based on the wrongful procurement of the patent and, therefore, that Walker was attempting to have the patent cancelled, something only the United States may accomplish by a lawsuit. Justice Clark's opinion for the Court rebutted that argument by showing that the fraud was significant only because it took the case outside the exception to Section 2 liability for those who enforce patents, whether valid or not, in good faith. "While one of [the] elements [of Walker's counterclaim] is the fraudulent procurement of a patent, the action does not directly seek the patent's annulment. The gist of Walker's claim is that since Food Machinery obtained its patent by fraud it cannot enjoy the limited exception to the prohibitions of §2 of the Sherman Act, but must answer under that section and §4 of the Clayton Act in treble damages to those injured by any monopolistic action taken under the fraudulent patent claim." 382 U.S. at 176. Justice Harlan's concurring opinion stressed that the fraud was important because imposing Sherman Act liability on those who in good faith enforced patents that turned out to be void for some technical reason "might well chill the disclosure of inventions through the obtaining of patents." 382 U.S. at 180.

The significance of the fraud practiced in obtaining the patent was thus twofold. First, Food Machinery tried to use its own fraud defensively, arguing that by relying upon it

Walker was actually suing to annul the patent. Justice Clark's opinion disposed of that contention. Second, the fact of fraud distinguished the case from good faith efforts to enforce patents that turn out to be invalid. The fraud demonstrated, that is, that Food Machinery was pressing a claim in court in order to harass a competitor with full knowledge that the claim was baseless.

The *Walker* decision is thus an antitrust precedent of general applicability. It stands for the proposition that pressing claims known to be without foundation for the purpose of stifling competition is a violation of Section 2 of the Sherman Act, provided that the other elements required are made out.

Petitioners, understandably reluctant to deal with the *Walker* rationale analytically, have instead focussed almost entirely upon two cases that create a zone of immunity from Sherman Act liability, or indeed from any legal liability. These cases are *Eastern Railroad Presidents Conference* v. *Noerr*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). Perhaps through carelessness, or perhaps out of their need to claim an impossibly broad immunity, Petitioners say of these cases: "this Court held that Congress did not intend the Sherman Antitrust Act to apply to joint activities to influence governmental action, even though inspired by anti-competitive motives and even though accompanied by a hoped-for or indeed known incidental effect that such activities would produce 'direct injury' to competitioners." (Brief for Petitioners, p. 14)

As Petitioners represent the rationale of *Noerr* and *Pennington*, these cases apparently overrule *Walker*, even though *Walker* is a later decision. Indeed, Petitioners' statement of the law would create an immunity for conspirators who filed false affidavits with a government department or presented perjured testimony to a court. All of these are attempts to "in-

fluence governmental action." We may safely assume that *Noerr* and *Pennington* stand for no such propositions.

We submit that *Noerr* holds that no legal liability may be created for statements made in the course of a political campaign or a petition to a legislature even though the statements are known to be false and are uttered for the purpose of securing legislation that will destroy the business of rivals. *Pennington* holds that no liability attaches to persons who persuade an official to exercise discretion that is lawfully his even though they too seek the destruction of business rivals. Moreover, these holdings are not based upon any intention of Congress, despite Petitioners assertions, but upon considerations rooted in the Constitution and in the necessities of a representative democracy. The rationale of the exceptions defines their scope.

The Sherman Act, the oldest, broadest, and most profound of our antitrust statutes, is framed in extremely general language. It renders unlawful any conspiracy to restrain trade or to monopolize. No exceptions are found in the statute's text and few or none in its legislative history. There is to be found nowhere in the deliberations of the Fifty-first Congress any statement that conspirators or would-be monopolists who acted through government should for that reason go free. Indeed, the ability of combinations to influence governmental authorities was one of the things that worried Senator Sherman. In urging the adoption of his bill he stated: "These combinations already defy or control powerful transportation companies and reach State authorities. They reach out Briarian arms to every part of our country." 21 Cong. Rec. 2460 (1890). If we had to depend upon the statutory language and legislative history alone, the better guess would be that the Sherman Act punishes every deliberate infliction of injury to competition no matter how wrought.

The exception which this Court has created rests upon reasons more profound than the congressional debates of 1890. Mr. Justice Black's opinion for the Court in *Noerr* relies explicitly upon a realistic appreciation of the needs of government that is democratic, representative, and vital.

Noerr involved a Sherman Act claim by 41 Pennsylvania truck operators and their trade association against 24 Eastern railroads, an association of the presidents of those roads, and a public relations firm. The complaint alleged that the railroads had hired the public relations firm, as the opinion put it, "to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers." 365 U.S. at 129. The complaint alleged that the campaign was motivated solely by the railroads' desire to injure the truckers and destroy them as competitors in the long-distance freight business, and, further, that the publicity matter was made to appear as the views of independent persons and civic groups although it was produced by the public relations firm and paid for by the railroads. The truckers won a judgment from the trial court (which held that a similar campaign by the truckers did not violate the Sherman Act), and the Court of Appeals for the Third Circuit, one judge dissenting, affirmed.

A unanimous Supreme Court reversed. Mr. Justice Black's opinion for the Court began from the premise, established in *United States* v. *Rock Royal Co-op*, 307 U.S. 533 (1939), and *Parker* v. *Brown*, 317 U.S. 341 (1943), that "where a restraint upon trade or monopolization is the result of a valid governmental action, as opposed to private action, no violation of the Act can be made out." *Eastern Railroad Presi-*

dents Conference v. *Noerr*, 365 U.S. 127, 136 (1961). The premise is unassailable. As Justice Black put it, "These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branches of government so long as the law itself does not violate some provisions of the Constitution." *Ibid.*

From this premise it follows ineluctably, given our system of representative government, that attempts to persuade legislatures to adopt or retain particular laws or to persuade executive officers to adopt or retain particular enforcement policies cannot be punished. Of what use is democratic government if the people may not freely make known their desires to their representatives? Thus, Justice Black's opinion noted the "essential dissimilarity" between agreements jointly to seek legislation and law enforcement and agreements traditionally condemned by Section 1 of the Sherman Act. 365 U.S. at 136. The application of the Act was conclusively barred when this element was considered along with two other considerations. The first of these was that the application of the Sherman Act would "substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." 365 U.S. at 137. Representative government, the opinion said, depends upon the ability of the people freely to inform their representatives of their wishes. Secondly, such an application of the statute would raise important constitutional issues, particularly the right to petition protected by the First Amendment. 365 U.S. at 138.

It did not matter, therefore, that the political campaign operated by the railroads employed deception and misrepresentation or that it had the effect of inflicting direct injury upon the truckers. To hold that either of those factors re-

moved the immunity demanded by the theory of representative government would be to cut deeply into the political process and to chill the right of petition.

The *Noerr* case, however, most certainly did not say or imply that *any* attempt to get *any* government official to do *anything* was beyond the reach of the Sherman Act and all other regulatory statutes. Justice Black carefully qualified the immunity by speaking only of "valid" action by "appropriate" branches of government. Those qualifications were built into his premise. And it was essential that they be built in. A realistic appreciation of the needs of government demands both that citizens have great latitude in making their views known and that governmental bodies not be misused to accomplish ends for which they were not designed and over which they have no legitimate authority. Justice Black was not saying, and never would have said, that, for example, a local police department could be used with impugnity to harass one's competitors. The fact that he joined a unanimous Court in the *Walker* case demonstrates conclusively that he, and the other members of this Court who joined in *Noerr*, espoused no such immunity as that claimed by Petitioners. It is one thing to make misrepresentations in the political forum and quite another to make knowing misrepresentations in courts. The difference in outcome between *Walker* and *Noerr* demonstrates this Court's appreciation of that fundamental difference.

United Mine Workers v. *Pennington*, 381 U.S. 657 (1965), which Petitioners seem to view as broadening the *Noerr* immunity, actually held, insofar as it is relevant to the present case, only that antitrust liability does not attach to those who persuade an executive officer of government to take an action clearly within his lawful discretion. The conspirators in Pennington persuaded the Secretary of Labor to establish a minimum wage for employees of contractors selling coal to the

TVA. They also urged TVA officials to curtail spot market purchases, a substantial portion of which were exempt from the minimum wage order. The conspirators were UMW officials and certain large coal producers, and their purpose was to injure smaller coal operators. *Pennington* did not create a blanket immunity for all attempts to influence government officials. Mr. Justice White's opinion suggested one important qualification in stating the rule: "The conduct of the union and the operators did not violate the [Sherman] Act, the action taken to set a minimum wage for government purchases of coal was the act of *a public official who is not claimed to be a co-conspirator* . . ." 381 U.S. at 671. (Emphasis added.)

In fact, this Court, in another opinion by Mr. Justice White, had already refused to apply the *Noerr* immunity when the governmental agent was a member of the conspiracy. The case was *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962). Plaintiff Continental brought a private treble damage action under Sections 1 and 2 of the Sherman Act alleging that defendants Vanadium Corporation of America, Union Carbide, and four of the latter's wholly owned subsidiary corporations had conspired to restrain and to monopolize, had monopolized, and had attempted to monopolize commerce in ferro-vanadium and vanadium oxide. One of the allegations was that Continental had been eliminated from the Canadian market where it formerly sold Van-Ex, a compound of vanadium oxide and other materials. Canada's entry into World War II prompted the Canadian government to control strategic materials available to Canadian private industry engaged in the war effort. The Office of Metals Controller was established and given broad powers to regulate the procurement of materials and to allocate them to industrial users. The Metals Controller enlisted the aid of Electro Met of Canada, a subsidiary of Union Carbide, in early 1943 and delegated to it discretionary agency powers to

purchase and allocate to Canadian industries all vanadium products required by them.

The District Court rejected plaintiff's offer of proof that Electro Met of Canada had actually excluded it from Canada under the control and direction of Union Carbide for the purpose of carrying out the overall conspiracy to restrain and monopolize the vanadium industry. The Court of Appeals affirmed. The theory in the District Court and the Court of Appeals was that the action was that of the Canadian government and therefore immune.

This Court reversed, holding that plaintiff's offer of proof should have been accepted. Canadian law did not require discriminatory purchasing and there was no defense Electro Met's behavior was countenanced by Canadian law. Mr. Justice White, writing for this Court, said that *Noerr* was "plainly inapposite," 370 U.S. at 707. The opinion said of *Noerr*:

> . . . [T]he Court ruled the defendants' activities to be outside the ban of the Act "at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." 365 U.S., at 138. In this case, respondents' conduct is wholly dissimilar to that of the defendants in *Noerr*. Respondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws. To subject them to liability under the Sherman Act for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would effectuate the purposes of the Sherman Act and would not remotely impinge upon any of the constitutionally protected freedoms spoken of in *Noerr*. 370 U.S. at 707-708.

The decisions of this Court plainly demonstrate that there is no general immunity for all attempts to influence official action. *Noerr* creates an immunity for efforts to secure or oppose legislation. *Pennington* finds an immunity for attempts to persuade executive officers to take actions within their lawful discretion. At the other end of the spectrum, *Walker* holds that advancing claims known to be baseless in court may be the basis for liability, and *Continental Ore* attaches liability for conspiring with an agent of government to take action not within his lawful discretion.

The case now before this Court, we submit, is governed by *Walker*. Respondents' complaint alleges that Petitioners urged baseless claims before courts and administrative tribunals, and that they did so with the purpose and effect of suppressing competition. *Walker* is squarely on point and makes such conduct cognizable under Section 2 of the Sherman Act.

Litigation now in process in lower courts and litigation to come in the future will, however, disclose a wide variety of other attempts to influence official action or to employ governmental procedures for the purpose of injuring competitors. It will be useful, therefore, to examine some of the factors that we believe should govern the outcome of such cases.

IV.

THE CONSTITUTIONAL AND POLICY CONSIDERATIONS THAT GOVERN THE APPLICATION OF ANTITRUST LAW TO ATTEMPT TO USE OR ABUSE GOVERNMENTAL PROCESSES DEMONSTRATE THAT RESPONDENTS' COMPLAINT STATES A VALID CLAIM FOR RELIEF

The case now before this Court and all cases involving attempts to invoke governmental processes necessarily implicate profound values of a democratic system of government. But those values do not, as Petitioners appear to believe, all press in one direction. There is the need, as *Noerr* fully recognized, that citizens have the widest latitude in bringing their views, information, and desires to the attention of their representatives. That need, of course, finds recognition and protection in the First Amendment to the Constitution. But there is also the correlative need that government be able to protect the integrity of its processes, that it be able to punish those who would abuse them. The power of government to do that is inherent and has never been doubted. It finds recognition not merely in cases such as *Walker*, decisions finding federal power to protect federal agents and functions, but also in countless ways, such as the power of governmental agencies to punish perjury and false affidavits, to summon witnesses, and so on.

Because there is a degree of tension between these constitutional values the cases involving attempts to use governmental processes for private gain will lie along a spectrum from the completely punishable to the completely immune. To lump all cases under either category would deny the needs of government and the values protected by our Constitution. We attempt in this section of our brief to discuss the considerations that seem proper in placing various situations on

the spectrum and determining the liability or immunity of those who misuse governmental procedures. We can offer no single bright line that disposes easily of all cases, dropping them neatly into one category or another. Reflection convinces us that no such line exists. But the factors that do control are sufficient, we submit, to offer the degree of certainty and predictability the field requires.

The opinion below by the Court of Appeals for the Ninth Circuit suggests that a line be drawn between attempts improperly to influence governmental bodies whose functions are essentially legislative or representational (in which latter category the Court includes law enforcement officers) and those whose functions are essentially adjudicative. The Court of Appeals decided that the need for uninhibited communication *Noerr* perceived with respect to representational bodies or officials does not exist to the same extent with respect to adjudicative bodies. It noted that "There is a marked difference between the processes by which they arrive at decisions, the materials upon which they may properly rely, and the atmosphere consistent with the effective performance of their respective functions." *Trucking Unlimited* v. *California Motor Transport Co.*, 432 F.2d 755, 759, n.6 (9th Cir. 1970).

There is, we believe, much to this insight, but we suggest that it may be refined and taken further. The nature of the governmental body is not alone the decisive factor, which is perhaps just as well since there are many governmental bodies whose "nature" on the representative-adjudicative continuum it would be difficult to state with confidence.

We suggest that the following five factors are prominent among those which determine the liability of persons charged with improper attempts to employ the coercive powers of government for wrongful ends and that they will usually be decisive: (1) The intent of the parties; (2) the means em-

ployed; (3) the character of the governmental process involved; (4) the character of the decision to be made; and (5) the degree to which the process focusses upon the formulation of general rules or upon the specific rights or liabilities of particular parties. Obviously, not all of these factors need point to liability for it to be proper in a particular case. The attempt to bribe a legislator to vote for a general rule of law, for example, is clearly punishable, even though the setting is legislative and the rights of a specific person are not directly involved.

We will discuss each of these factors in turn to illustrate their application to the problem.

(1) The Intent of the Parties.

Liability will usually attach only if the parties attempting to use government for their own ends have a specific intent which would render their behavior unlawful had they chosen other means of accomplishing their ends. When the sanctions invoked against such persons arise from the antitrust laws, as in the case now before this Court, there must be an intent to suppress competition by the destruction or harassment of business rivals. But a specific intent, in the sense of an ultimate purpose which is wrongful, will not be essential in all types of cases. Sometimes the employment of wrongful means, the factor to be discussed next, will suffice. Thus, one who commits perjury or attempts to bribe an official may be punished even though his ultimate purpose, the result he seeks, may be described as laudable. For antitrust cases, however, it is difficult to imagine a situation in which a specific intent to monopolize or restrain trade would not be an essential element of the case.

(2) The Means Employed.

Regardless of intent, parties can be held liable only if they

employ means of influencing governmental action that are in themselves illegal or reprehensible. Here, Petitioners are alleged deliberately to have agreed to press baseless oppositions to applications for operating rights before courts and before administrative tribunals, and they are alleged to have done what they agreed to do. Had they employed other means (e.g., individually opposing applicants only where the Petitioner in opposition had reasonable cause for his position) there could have been no Sherman Act liability. Similarly, the knowing use of perjured testimony or the bribery of an executive officer would subject the party engaging in such conduct to liability.

The use of illegal or reprehensible means of influencing government is perhaps a necessary condition for liability but it is not a sufficient one. *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961), demonstrates the truth of that proposition. The railroads there employed tactics that were certainly unethical, including the formation of sham citizens groups which put out statements and material that were actually prepared by the railroads and their public relations agency as if they were the product of the citizens groups. These misrepresentations were, nonetheless, immunized because they occurred in an explicitly political context. Thus, the character of the process in which the use of reprehensible tactics occurs affects the question of liability. We turn to this factor next.

(3) The Character of the Governmental Process Involved.

The more open, informal, and explicitly political is the governmental process the conspirators use, the greater is the scope of their immunity for reprehensible tactics intended to injure or destroy rivals. The *Noerr* case dealt with the employment of a completely political process and the conspirators' immunity was, therefore, complete. Even the use of mis-

representations was held not to destroy immunity, and that decision was clearly demanded by the philosophy of the First Amendment in order to allow free play to the rough-and-tumble political struggles characteristic of democracy.

As the governmental process of information gathering and decision-making becomes more formalized, moves more toward the model of judicial decision-making, the immunity of the conspirators correspondingly begins to narrow. If, in the context of the dispute disclosed in *Noerr*, the Pennsylvania legislature had decided to get at the merits of the controversy by establishing a legislative investigating committee, the scope of the conspirators' immunity would have been considerably reduced. Constitutional considerations would not have prevented the punishment of any industry representative who, testifying under oath before the committee, made misrepresentations of the sort contained in the publicity campaign. When the legislature creates a fact-finding process fashioned after the judicial model — with witnesses, oaths, cross-examination, a written record, and the like — it becomes correspondingly able to punish deliberate falsehoods and other abuses of its process that would be immune in the regular political arena. It hardly requires saying, of course, that the creation of a fact-finding committee does not displace the general political arena and that immunity the conspirators enjoy there continues.

We have seen that law may punish those who knowingly advance baseless claims in court, and it is undisputed that the legislature may punish those who lie to its investigative committees. What these situations have in common is a formalized process by which judicial or legislative tribunals attempt to find facts. Both courts and legislative committees may have the lawful power to make policy judgments, but that does not make everything that is said to them, no matter

how groundless or false, immune. The distinction is essential. Our society requires a wide open political process, robust and free. It also requires that there be more formal, constrained procedures for the establishment of certain types of facts and the application of policies. Processes of the latter type must be guarded from abuse if they are to be effective. To say that everything that is said to any kind of tribunal is "political expression" and therefore unregulable is to "politicalize" the courts, legislative fact-finding committees, and administrative tribunals so that they lose much of their present value and may become unmanageable. This is the reason that the character of the decision-making process that government employs affects the scope of conspirators' immunity from liability.

Petitioners have attempted to wrap the cloak of the First Amendment about their agreement to advance baseless claims before courts and administrative tribunals. It is a very poor fit. It is utterly incongrous that Petitioners should attempt to rely on such cases as *NAACP* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217 (1967); and *United Transportation Union* v. *State Bar of Michigan*, 39 U.S.L.W. 4428 (U.S. April 5, 1971), to justify their squalid little commercial conspiracy. If *Button* controls this case, every abuse of the procedures of courts and administrative tribunals is "political expression" and sanctified. We do not believe the cases will bear any such construction.

In *Button* the NAACP had organized in order to advance the constitutional rights of Negroes in the federal courts as well as to see that Negroes' legal rights were protected in practice. That purpose was held essentially "political" and the state was unable to interfere with it through laws about

the relationship of lawyers and their clients. *Button* fell within the area protected by the First and Fourteenth Amendments to the Constitution.

There is no way Petitioners can make their alleged conduct look like the conduct of the NAACP in *Button*. They were not organized to advance legitimate constitutional claims, nor was their purpose to protect the procedural rights of large truckers to fair trials. To make *Button* resemble this case one would have to change its facts completely and imagine that the NAACP had decided to advance the welfare of Negroes by threatening the white employers in an area with continual lawsuits, whether there was a valid claim or not, until, from sheer economic coercion, the employers agreed to practice reverse job discrimination and to pay blacks more than whites. That abuse of judicial processes, involving the advancing of baseless claims in order to destroy and coerce men economically, would certainly not have merited or received the constitutional protection that was in fact accorded to the legitimate use of litigation in *NAACP* v. *Button*.

Petitioners' reliance upon the labor union cases is equally misplaced. This Court held only that workingmen had a right to band together to obtain competent legal counsel to press their claims. There was not a breath of a suggestion that they had a right to band together to press baseless claims for the ulterior purpose of making employers give way on wage bargaining. Yet Petitioners are charged with conduct like the latter.

The character and form of a governmental process, then profoundly affects the use that may legitimately be made of it. Access to judicial and administrative processes may be a constitutional right, but there is no constitutional right to make deliberate misrepresentations to such tribunals or to press baseless claims for the ulterior purpose of wreaking eco-

nomic injury upon a competitor. *Button* and the labor union cases would have come out differently if that had been what they involved.

(4) The Character of the Governmental Decision.

The character of the decision that government must make will, of course, greatly influence the character of the process that is employed. But this relationship is not neat and invariable. Sometimes, for example, an executive officer is entrusted with what amounts to legislative discretion, as was the Secretary of Labor whose discretion to impose minimum wage standards was involved in *Pennington*. In such cases, no particular form of process may be specified, and the official is properly free to arrive at his conclusions in the manner that he finds most expeditious. If he acts within the area of his lawful discretion, no court will interfere, and no court will impose liability, under the Sherman Act or any other statute, upon those who attempt by lawful means to persuade him to take one decision rather than another.

But when the official, agency, or tribunal has circumscribed powers of decision, courts may invalidate actions that are outside the area of discretion and may impose liability upon those who knowingly and wrongfully induce action that is beyond the power of the agency of government involved. The classic example, of course, is the bribery of an official to take unlawful actions, but there are a variety of other situations in which there is no immunity for attempts wrongfully to influence governmental action.

This topic appears to be closely related to the political question problem so frequently raised in constitutional law. Indeed, it appears that the two problems are rooted in the same policy grounds and should find similar solutions. When Chief Justice John Marshall laid the foundations of the political question doctrine in *Marbury* v. *Madison*, 1 Cranch 137

(1803), he made a distinction that is fully applicable to many issues of liability for attempts to influence governmental action: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined." 1 Cranch at 170. So here, it is not by the "nature" of the arm of government that decides, but by the character of the decision to be made, that the decision of liability for those who seek to invoke the action of an agency of government is to be determined.

If the agency of government in question has no authority to do what it is used for, those who procure such action, knowing the limits of authority and with wrongful intent, may properly be held liable. Two illustrations of differing nature come to mind. We may hypothesize a combination of automobile dealers in a city who are upset by the aggressive competition of one dealer. That dealer makes a practice of acquiring and reselling to the public makes and models of automobiles for which he is not franchised. Under the Sherman Act the manufacturer who does franchise him may not penalize him for this practice. His rivals, however, induce an employee of the state's department of motor vehicles to harass this dealer until he stops selling makes for which he is not franchised, and this is done even though the department of motor vehicles has been given no authority over such questions whatever. Here a government official is acting in an area where he has no power to act, deciding issues of competition that he has no authority to decide. Courts may properly restrain him and, provided the requisite knowledge and intent are proved, may hold liable under the Sherman Act those who induced the action.

The second illustration is of a slightly different nature but its outcome should be the same. Suppose that a large chain

of motion picture theatres decides to block the access of rivals to towns where it has the only theatre, and to that end it adopts the tactic of opposing the construction of any additional theatres before the local zoning boards and of pursuing such opposition through all state courts. The zoning boards, under state law, have no authority to consider the desirability of competition but may only consider effects upon surrounding residential property, the capacity of the streets to handle increased traffic flow, and like matters. The motion picture chain, though it has absolutely no interest in such issues and no legal right to raise them, nevertheless battles through the zoning board and all state courts, striving for as much delay and expense at each stage as possible. Here no governmental agency is induced to take action that is outside its discretion, but the procedures of the zoning boards and the courts are invoked merely to create expense and delay in order to postpone or prevent the appearance of competition. If a would-be entrant could prove that it had been delayed by the invocation of the board procedures, that it had suffered heavy expense, that the opposition was sham and without merit and put up in bad faith for the sole purpose of monopolizing, then, we submit, there would be no doubt that the entrant would have a valid claim under Section 2 of the Sherman Act. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), holds as much. The character of the decision the tribunal is empowered to make is quite different from the effect the predator seeks by misusing the tribunal.

The *Noerr* opinion suggested that even an approach to a legislative body might subject predators to liability if the apparent effort to influence the legislators was a clear sham and engaged in only to inflict harm upon business rivals. That is a possibility the Court was wise to keep in reserve. It is far clearer that sham approaches to judicial and administrative

tribunals with the intention only of inflicting competitive injury should constitute offenses under the Sherman Act.

(5) The Degree to which the Process Invoked Focusses Upon the Formulation of General Rules or Upon the Specific Rights and Liabilities of Particular Parties.

Immunity is properly broader when the framing of general rules is the object of a governmental process than when the force of government is to be brought to bear upon the specific rights of particular parties. This factor overlaps and complements the others, but we believe it has weight of its own.

In part, this consideration parallels the distinction between legislative and judicial functions, but it has application in other contexts where persons attempt to influence official action. Citizens groups, for instance, frequently meet with police officials to make known their desires with respect to law enforcement policy, and it would be unthinkable that an individual citizen could be held liable for the motives which underlay his urging of a general policy or even for misrepresentations about the seriousness of the situation. But when the discussion narrows and begins to focus upon action to be taken against an individual, the immunity of the person who urges the police to act begins correspondingly to narrow. If one person tells what he knows or thinks he knows about another, he is surely safe. But no one would urge that a person is immune from prosecution who improperly, whether by falsely representing facts or by bribery or by other reprehensible means, induces the police to arrest and imprison his personal enemies or business rivals.

Perhaps one reason this factor is important is that processes which focus upon the individual party have a far greater capacity to hurt than do processes aimed at the formulation of general rules. Even when there is nothing to the case asserted against him, the individual person or firm forced to

fight a baseless claim is required to expend time and money. In many cases the cost may keep the party out of the market altogether. In others, the price of buying delay is worth it to the predator who reaps noncompetitive profits in the meantime. Such results are less likely when the governmental process aims at general rule making. Thus, the predator in *Walker* was able to force its victim to defend an expensive patent litigation. The same result could not have been achieved had the predator attempted to obtain from Congress a favorable change in the patent laws. The very generality of the proposal would have attracted the interested participation of many persons, in and out of Congress, so that the burden of fighting the issue would not have fallen upon a single victim.

It is true that courts and administrative tribunals often formulate general rules in the course of deciding particular controversies and the rights and liabilities of individuals. Indeed, Petitioners here rely upon that truism in an effort to convert their harassment of smaller truckers into a large-spirited effort to discuss general policy. This argument, too, is a sham. There comes a time when, after repeated unsuccessful attempts to get a judicial or administrative tribunal to adopt a policy one wants, it must be admitted that the law is otherwise. Courts, particularly in their function of interpreting and applying the Constitution, formulate broad policies. It is legitimate for persons dissatisfied with a particular formulation to hope that the courts will alter their view and overrule it. That possibility has led many persons, and even state and local governments, to resist the law of the Constitution as announced by this Court. The problem has been acute in issues of racial segregation in public schools. But there comes a time when, at last, one must accept the fact that the law is otherwise than one would wish it and cease resistance to it. As Professor Herbert Wechsler has said,

"When that chance [of a change in policy] has been exploited and has run its course with reaffirmation rather than reversal of decision, has not the time arrived when its acceptance is demanded, without insisting upon repeated litigation? The answer here, it seems to me, must be affirmative, both as the necessary implication of our constitutional tradition and to avoid the greater evils that will otherwise ensue." Wechsler, "The Courts and the Constitution," 65 Colum. L. Rev. 1001, 1008 (1965).

On a more mundane level one could not endlessly sue one's neighbor for nuisance because of the noise his children made playing in their backyard on the ground that the facts had not changed but that one is entitled perpetually to hope for a judicial alteration of tort law. At some point the pretense of using the individual case as a vehicle for seeking new general rules must be recognized for what it is, the deliberate harassment of a private party. At that point the neighbor can secure an injunction against further harassing litigation on the same issue and damages for the tort of malicious litigation.

So it is here. Petitioners cannot excuse an agreement to fight every application for operating rights on the ground that they were incorrigible optimists and believed that every case might alter general policy. It is alleged that some of their oppositions were utterly baseless, without any chance of success, and they knew it. At that point, they were abusing the processes of law in order to run rivals out of business. At that point, at the latest, liability under the Sherman Act set in.

CONCLUSION

Looked at from any viewpoint, Respondents' complaint states a claim upon which relief may be granted. The Sherman Act clearly applies. The statute's text, legislative his-

tory, and consistent course of interpretation show that it applies to any attempt to monopolize no matter how accomplished. The abuse of governmental processes is a modern and particularly dangerous form of predation. Section 2 of the Sherman Act clearly applies to it unless profound policy considerations, rooted in the Constitution, forbid that application.

The extremes of liability and immunity are marked by this Court's decisions in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), and *Eastern Railroad Presidents Conference* v. *Noerr*, 365 U.S. 127 (1961). The spectrum of cases falling between these extremes is calibrated by policy considerations ultimately rooted in constitutional considerations. We have attempted to spell out five factors that control the issue of liability or immunity in this class of cases.

We think there is little doubt about the case now before this Court. It is covered directly by the precedent of the *Walker* case. There, too, the allegation was that a baseless claim had been urged for the purpose of injuring competition, and this Court held that allegation to state a claim under Section 2 of the Sherman Act if the other elements of the offense were made out. A trial in this case may disclose other indicia of wrongful intent and knowing abuse of process.

The case being litigated by *amici* in the federal District Court for the District of Connecticut contains even stronger allegations. Each of the five criteria discussed indicates liability there if the allegations are proved. In our case there can be no contention that the state court or the local zoning board had any authority whatever to consider the desirability of competition. Connecticut law is explicitly to the contrary. We allege that competitive shopping centers have asserted baseless claims, as in the *Walker* case, claims that they have no

standing or lawful right to litigate. But the assertion of such claims in opposition to a zone reclassification imposes delay and expense upon *amici* and may ultimately defeat their efforts to establish a shopping center.

We respectfully urge the Court to take this opportunity to spell out the guidelines for future litigation of this sort, and we suggest that the five criteria discussed should be prominent among those controlling. While there must be free play for the political process to operate, even when the participants are governed by nothing but the crassest self-interest, there must also be preserved the integrity of other processes that are not, and should not be, fully political. An appreciation of the requirements of the effective functioning of democratic government as well as the effectiveness of antitrust policy requires no less.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 70-92

(Previously October Term, 1970, No. 1419)

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners,*

vs.

TRUCKING UNLIMITED, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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In the Supreme Court
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The respondents adopt the petitioners' statement.[1]

QUESTIONS PRESENTED

1. Is the concerted and deliberate use of judicial and administrative adjudicative processes, as the method of

[1]The respondents will follow the system of reference to appendices employed by petitioners. The appendix agreed to by the parties and printed in a separate pamphlet is referred to as "Jt. App." The appendix at the end of this brief is referred to as "Attached Appendix."

implementing a scheme to restrain trade, as alleged in the First Amended Complaint and set forth below under "Contents of First Amended Complaint" (pp. 4-8) exempt from the Sherman Act by the *Noerr-Pennington*[2] doctrine, as a matter of law on a motion under FRCP, Rule 12(b) (6)?

2. If the *Noerr-Pennington* rule extends to the use of judicial and administrative adjudicative processes in a scheme to restrain trade, is relief under the Sherman Act barred, as a matter of law on a motion under FRCP, Rule 12 (b) (6), where the real purpose and actual effect of defendants' joint activities was to restrain competitors directly by deterring the filing and prosecution of applications rather than by genuine efforts to induce governmental action detrimental to competitors, as set forth below under "Contents of First Amended Complaint"?

CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

The appendix attached at the end of this brief contains the relevant provisions, in addition to those set forth in the appendix to Brief for Petitioners, of (1) the United States Constitution, (2) the Sherman Act, (3) the Interstate Commerce Act, (4) the Administrative Procedure Act, (5) the General Rules of Practice of the Interstate Commerce Commission, (6) the Urgent Deficiencies Act, (7) the California Constitution, (8) the California Public Utilities Code and (9) the Rules of Practice and Procedure of the California Public Utilities Commission.

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[2] *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

STATEMENT

1. Introduction

This case is before this Court because the district court, by Memorandum of Decision dated October 5, 1967 (Jt. App. 22-43), granted the petitioners' (hereafter "defendants") motion to dismiss under Rule 12(b) (6), FRCP. Defendants also filed a motion to dismiss for lack of jurisdiction, asserting that the present action was within the exclusive or primary jurisdiction of the Interstate Commerce Commission (ICC) or the California Public Utilities Commission (PUC). This jurisdictional motion was not argued before nor considered by District Court Judge Sweigert as shown by his letter of October 25, 1967. (Jt. App. 44-45).

Therefore, all questions of exclusive or primary jurisdiction, exhaustion of administrative remedies, express exemption or implied immunity from the antitrust laws have not been briefed, argued nor decided and are not presently before this Court. The sole question considered and ruled upon by the two courts below is whether the *Noerr-Pennington* doctrine precludes, as a matter of law, the application of the antitrust laws to the facts alleged in the First Amended Complaint.[3]

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[3]The defendants in their brief attempt to bring into issue or into evidence matters outside the pleading and outside the scope of the 12(b)(6) FRCP motion to dismiss. Whether the agencies or courts were prevented from exercising control over petitioners is not the question here in issue. The only question before the court is the reach of the *Noerr-Pennington* doctrine to the activities set forth in the complaint and not whether the involved forums, having some potential to control, had exclusive jurisdiction, thus excluding Sherman Act operation. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

A host of other cases decided by the Court are clear in their holding that no industry, regardless of regulation, enjoys a blanket

2. The Contents of the First Amended Complaint

The First Amended Complaint alleges that the petitioners (hereinafter defendants), the 19 largest highway common carriers in California and the West, and respondents (hereinafter plaintiffs), 15 highway common carriers, were engaged in the business of transporting goods throughout California, pursuant to certificates of public convenience and necessity granted by the PUC and the ICC.

For many years prior to 1961, and continuing uninterruptedly to the date of filing of this action, the PUC announced and maintained a liberal policy with respect to the granting of applications for certificates of public convenience and necessity and the transfer thereof, thus implementing its announced policy of encouraging competition among carriers large and small. Certificate rights were granted as a matter of course with no opposition in almost all cases because of the clarity with which the PUC had stated its liberal policy. However, procedures for protests, hearings, rehearings and appeals were unchanged

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exemption from the antitrust laws. *U.S. v. Philadelphia National Bank*, 371 U.S. 296 (1963); *U.S. v. Pacific & A.R. & N. Co.*, 228 U.S. 87 (1913); *U.S. v. Radio Corporation of America*, 358 U.S. 344 (1959); *U.S. v. Borden Co.*, 308 U.S. 188 (1939); *U.S. v. Federal Power Commission*, 369 U.S. 482 (1959).

Petitioners' lawful standing to appear in such proceedings is not authorization to violate the antitrust laws nor does such standing exempt or immunize them from those laws. Furthermore, respondents are not required by the regulatory statutes involved or by the requirements of the Sherman Act to seek whatever relief might be available through agencies before filing a treble damage action. *Carnation Co. v. Pacific Westbound Conference, supra,* at 222. Nor do the restrictions of the Sherman Act to a common carrier depend upon whether false information is given. Sherman Act violations based upon concerted employment of adjudicatory processes or the "sham" exception to the *Noerr-Pennington* doctrine do not require false information as a predicate for liability.

and available. Prior to 1963, any certificate granted by the PUC could be registered automatically with the ICC. Registration of certificates conferred the right to engage in interstate operations under the same terms and conditions as specified for intrastate rights granted by the PUC, without an independent hearing on the issue of interstate public convenience and necessity, until 1963, when applications, protests and hearings were made available in registrations and hence came under defendants' plan.

The complaint alleges that the defendants, in order to frustrate this policy and combat the competitive effects thereof, entered into an agreement in February 1961, to protest *all* applications for common carrier certificates and transfers then pending before the PUC and the ICC,[4] and all applications thereafter filed before these commissions. It was agreed in February 1961, that all applications were to be opposed, with or without consideration of probable cause and regardless of the merits of the appli tion or the protest. The practice has persisted from that date to the date of filing and beyond.

Defendants agreed first to make known and publicize to the industry—not the agencies or courts, or the electorate or shippers—in crystal clear terms that any and all applications, irrespective of merit or any other factor, would be met with a formal protest by defendants as a group. They publicized the identity of the members of defendants' group in order to make unmistakably clear their

[4]Appellants are informed that of approximately 60 applications pending in February 1961, 53 protests were filed. Of the 7 remaining, 5 involved local drayage area rights and 1 REA application. One common carrier application was not protested.

financial ability to carry out their proclaimed aims. They agreed that the deterrent effect would be greatest if all competing truckers knew with certainty that each protest would be pursued to the last and highest forum available and that every intermediate procedure would be exhausted if defendants lost their protests at the level below. It was made known to all truckers that any application filed by anyone would involve prohibitive expense and long delay. The plan included the feature and competitors were to be and were in fact informed that each of the 19 defendants was committed by binding agreement to the others to contribute, in amounts proportionate to each defendant's annual income, to a litigation trust fund to finance the program of protests whether or not the individual defendant had a direct competitive interest in any given protest. Even if the application were ultimately granted, this could only occur after prohibitive delay. Defendants' combination had as its basic intention the destruction and weakening of competition. The primary purpose of the conspiracy was to discourage, preclude and deter the filing of applications or, once applications had been filed, to discourage, preclude and delay their prosecution. The restraint upon competition was intended to have its principal effect prior to filing for rights or hearing and not at the time the commission involved decided the merits of the application. Defendants thus have supervened the liberal policy and have substituted their own, one of noncompetition, by the means pleaded.

The complaint does not allege that once a protest was filed the defendants failed to make a determined effort to present the best case possible under the circumstances in

support of the protest. Defendants' plan, as alleged, took into account that in order to give credibility to the plan, to remind potential applicants of its constant vitality and to discipline those who failed to get the message, full, competent and determined efforts had to be made at hearings. What the complaint does allege is that the agency decision in any given proceeding was highly immaterial. Defendants were acting to close the door to operating rights for other carriers, to protest—not necessarily to win—although to win was desirable—in order to set an example, to discipline competitors, to intimidate them, to implement defendants' own "non-liberal" policy and to create a monopoly in themselves. Defendants' combination was not formed for the purpose of inducing governmental action but to obviate it.

The complaint further alleges that the objectives of the defendants' conspiracy were fully realized. The threat of inexorable opposition, the dissemination of the fact of their resolve to protest coupled with the actual prosecution of protests caused the certification process to degenerate from a level where many applications were filed and virtually all were granted to a point where practically none were filed. The impact of defendants' conspiracy was so pervasive that it subverted the machinery and function of the PUC, the ICC and of the courts to defendants' own illegal purposes which, as clearly pleaded, were to destroy or lessen competition by the means agreed upon by them. The effective result was that the commissions and the courts were supplanted by the conspiracy which became the regulator of certificates of public convenience and necessity.

The complaint alleges that the plan was successful not because of any change in the liberal policy of the PUC nor because of defendants' success on the merits in various proceedings but rather due to abstentions from filing of applications, settlements and voluntary dismissals. It was direct intimidation, not governmental action, which restrained competition in this case. (Jt. App., p. 4-12.)

3. The Regulatory Context of This Case

(a) Essential Role of Certificates of Public Convenience and Necessity, Their Registration and Transfer

This case involves common carriers. A trucker cannot become a common carrier without a certificate of public convenience and necessity, and a common carrier cannot expand its territory without such a certificate authorizing extension. A common carrier cannot move its trucks without such specific authorization. A certificate of public convenience and necessity is a grant of a partial monopoly by the state to a business enterprise authorizing it to conduct business as described therein. (California Public Utilities Code §§1005, 1061, 1062, 1063, 1064 and 1069.) The focus of this case is on the proceedings involved as a condition precedent to entry into or expansion of a business, because, in the relevant service market, obtaining a certificate is the first and indispensible step to entry or expansion of business.

It is well known that business expansion in California and the West has been unprecedented. The role of the highway common carrier has been crucial to this expansion. New industries and established Eastern companies have entered the Western markets. Transportation of goods and packages between populous centers and more

remote areas has increased tremendously as such remote areas became more urbanized. To respond to these changing patterns of demand, access to the source of rights to operate trucks on regular routes between fixed points was and is fundamental. These rights are essential to the conduct of business. They are, in economic effect, one and the same. Rights, once acquired, may be registered with the ICC, entitling the registrant to use the intrastate routes as part of their interstate operation. 49 U.S.C. §306(a)(7. Registration with the ICC normally eliminates a double hearing and is authorized by federal statute.

Registration, like the certificate to be registered, is an important and valuable business right for the same reasons the certificate is valuable. Certificates are valuable not only because they can be the basis for a common carrier seeking to earn a profit, but also because they can be bought and sold, like any other asset. Because of expanding business and industry in the West and the great role common carriers have had in this expansion, a certificate which cannot be extended as markets expand is of much less value than one which readily can be. Furthermore, if it is known by a carrier that it will be exceedingly difficult to transfer a certificate, he is, by that reason alone, effectively deterred from seeking a certificate or extension of it in the first instance.

(b) The PUC, ICC and the Courts are the Exclusive Agencies Through Which Certificates, Their Registration and Transfer Can Be Secured

Motor carriers have no sources other than the PUC and ICC from which to obtain business rights. If carriers do not have full and free access to such agencies, these valu-

able rights will not be available to them even though they otherwise qualify according to regulatory standards.

(c) Only the Adjudicatory Function of the PUC and ICC Is Involved In This Case

Common carrier rights are acquired only by the filing of a formal verified application and a finding of public convenience and necessity. The proceedings are similar to court proceedings in the sense that they are adversary in nature. In courts as well as in agencies, some proceedings are unopposed. However, in all cases in which opposition occurs, the proceedings are adversary proceedings and the isues presented are adjudicated.

Plaintiff's attack is directed solely at defendants' uses of the adjudicative processes of the courts, the PUC and the ICC. The adjudicatory function of the PUC is initiated by the filing of a formal verified application (California Public Utilities Code §1069) upon which a hearing is held. (Rules of Practice (ICC) Rule 247 [49 CFR §1100.247], California Public Utilities Code §1005.) Such hearings are judicial in nature. They are characterized by the use of process, formal notices as specified by statute, discovery (including the taking of depositions), use of subpoenas and subpoenas duces tecum identical to the procedures employed by the Superior Courts in California, the taking of testimony under oath, findings of fact, conclusions of law, decisions and opinions, use of precedent in the decisional process, the making of a record and the prohibition against informal approaches to the hearing officers or commissioners concerning a case while it is under consideration. Appellate review of Commission decisions is available. (See statutes and rules set forth in

attached appendix.) The agencies involved here have many functions other than the one characterized above as judicial. Plaintiffs desire to make it clear, and believe it is clear from the First Amended Complaint, that no functions of the agencies other than the adjudicatory processes described are involved in this case. (Jt. App. 3-4.)

4. Reasoning of Decisions Below

(a) Federal District Court, Per Judge Sweigert

In granting defendants' motion to dismiss, Judge Sweigert construed the *Noerr* and *Pennington* decisions of this Court *(Eastern Railroad Presidents Conference v. Noerr, supra; United Mine Workers v. Pennington, supra,* to hold that no violation of the Sherman Act could be predicated upon combined approaches before "governmental officials" (including judges and administrative adjudicators) even when the sole purpose and intent of the persons engaging in such activity is to restrain trade and destroy competition. While Judge Sweigert recognized that *Noerr* and *Pennington* dealt only with the "legislative" and "executive" branches of the government, he concluded that since the right of access to courts and administrative adjudicatory agencies "is just as much a political right as the right of access to the legislative and executive branches" (Jt. App. 34), the rationale of *Noerr* and *Pennington* was equally applicable.

Further, Judge Sweigert held that the activities of defendants did not fall within the "sham" exception of the *Noerr* case because plaintiffs could not allege that all of the applications filed were meritorious nor that all of the protests filed were groundless. Because the defendants

influenced rulings on the merits in some of the application proceedings, their activities were deemed to be "genuine" efforts to influence government. The allegations regarding the deterrent effect of raising the burdens of application to prohibitive levels were dismissed as describing nothing more than an incidental effect of litigation and of no independent significance.

(b) Dissenting Circuit Judge Hamlin

Judge Hamlin adopted the reasoning of Judge Sweigert, felt that the certification procedure is one "akin to policy-making" (Jt. App. 60), and that any abuses of these procedures should be within the exclusive jurisdiction of the respective commissions. As noted above, this latter ground is not before this Court. Only the motion to dismiss based upon *Noerr* and *Pennington* has been decided by the District Court (Jt. App. 44-45), and the power of the commissions to regulate participation in their proceedings is irrelevant to this issue.

(c) The Ninth Circuit Court of Appeals

The Court of Appeals, per Circuit Judge Browning and District Judge Pregerson, sitting by designation, reversed the District Court on two grounds. First, the *Noerr-Pennington* doctrine does not immunize agreements to use judicial and administrative adjudicative processes in a scheme to restrain trade. Second, even if this were not true, the complaint sufficiently alleges that defendants' activities were "mere sham," designed to restrain competition directly by the joint efforts of the defendants rather than indirectly by inducing restrictive governmental action. (Jt. App. 47-48.)

The Court pointed out that the *Noerr-Pennington* doctrine was a judicially implied exception to the general rule that an unlawful purpose may bring otherwise lawful means within the broad proscriptions of the Sherman Act. This exception was designed to protect the channels of political communication fundamental to the maintenance of a representative democracy and should be limited to joint approaches before governmental officials and bodies which act in a representative capacity. Since officials in the legislative and executive branches of government have the power to take action which operates to restrain trade, mere solicitation that such action be taken should not be proscribed regardless of purpose or intent.

The judicial branch and agencies acting as adjudicators, on the other hand, are not vested with the power to determine whether laws restraining trade will be enacted or, once enacted whether they will be enforced. Nor do such bodies act in a representative capacity. Their function is judicial, i.e., the application of standards of greater or less generality to concrete cases. The Court held licensing procedures to be adjudicative. (Jt. App. 50.) For these reasons the process of decision making, the materials which may be relied upon, and the atmsophere consistent with the effective performance of their respective functions are markedly different from those which obtain before the legislative and executive branches of government.

The court noted that the patent-antitrust cases, typified by *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); and *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963), support three conclusions. First, that defendants' abuse of judicial

and administrative adjudicative processes is not "essentially dissimilar," in the *Noerr* sense, from conduct traditionally condemned by the Sherman Act. Second, that while purpose and intent may be immaterial where the target of concerted approaches is legislative or executive, unlawful or wrongful intent or purpose is of determinative importance when the joint approaches are made before judicial or administrative adjudicative agencies. Third, the Court also noted that agreements to use litigation as a means of restraining trade, as opposed to redeeming civil rights, are not essentially dissimilar from conduct traditionally condemned by the Sherman Act and that such agreements were not immunized by either the *Noerr-Pennington* or *Button*[5] rules. (Jt. App. 51-52.) The Court pointed out that the subject matter of litigation was irrelevant where processes of adjudicating forums were being used for unlawful purposes, either alone or in conjunction with other means. (Jt. App. 53.)

With respect to the "sham" exception to the *Noerr-Pennington* doctrine, the Court held that "regardless of the status of joint approaches to adjudicative bodies," the complaint adequately alleges a conspiracy to impose a direct restraint under the guise of a program to induce governmental action rather than a genuine effort to induce such action. (Jt. App. 54.) Indicative of this intent to impose direct restraints were the decision to protest all common carrier applications for certificates, the communication of the existence, purpose, and jointly financed trust fund of the program of indiscriminate protests to competitors but not to the PUC, ICC or the courts, informing

[5] *NAACP v. Button*, 371 U.S. 415 (1963).

competitors that each and every application would be opposed with or without probable cause and regardless of its merits, resulting in burdens for the applicant far outweighing the potential benefits of the certificate if ultimately granted. When any competitor applied for certificates, the defendants carried out their threats and thereby effectively deterred the filing of subsequent applications. The Court stated that the "purpose of defendants' joint activity was not to induce action by the affected governmental agencies, but to preclude it." (Jt. App. 54, 58.)

Since every application was to be opposed, the Court held that it is irrelevant that a valid basis existed for opposing some applications. Nor was it significant that defendants made their opposition as effective as possible —mere token protests would not produce the desired effect. That defendants' activity would influence rulings of the agencies was inevitable, given the means employed, injury from resulting state action was merely incidental to the realization of the objective of deterring the filing of applications. Therefore, defendants' activities were "mere sham" unprotected by *Noerr* and *Pennington;* to hold otherwise would make the "sham" exception inapplicable to any conspiracy to restrain trade "cloaked with the mantle of a campaign to influence governmental action." (Jt. App. 59.)

SUMMARY OF ARGUMENT

The Ninth Circuit decision was correct in holding that defendants' conduct is not exempted from the Sherman Act under any decision of this Court, specifically *Noerr, Pennington* and *Button.* It correctly concluded that defendants' activities are condemned by the Sherman Act because their conduct is similar to that of the defendants in the patent and other antitrust cases where a combination engages in predatory conduct to unreasonably restrain trade or destroy competitors.

I. This Case Is Not Within the Noerr-Pennington Doctrine Because Defendants' Conduct Was Mere Sham

The *Noerr-Pennington* doctrine does not extend to the use of adjudicatory processes of government in a scheme to restrain trade. This position will be demonstrated under heading II, infra. Even if the *Noerr-Pennington* doctrine extends to joint approaches before adjudicatory bodies it does not immunize defendants' conduct because it is an "ostensible" rather that "genuine" attempt to induce governmental action.

The defendants challenge the allegations of the complaint, contending that they were indeed honestly and genuinely seeking to induce governmental action by making the best case possible in support of their indiscriminate protests. They argue that any additional burdens imposed on applicants were merely incidental to these genuine efforts. On the other hand, the complaint alleges that the intent and purpose of defendants' program of litigation was to deter and put a stop to the filing and prosecution of applications not by influencing or inducing governmental action but rather by increasing to prohibi-

tive levels the costs of obtaining additional business rights. Plaintiffs submit that the issue of the "genuineness" of defendants' efforts to induce governmental action is a question of *fact*, and not of law, which entitles plaintiff to a trial on the merits.

Defendants' argument that the Ninth Circuit opinion requires "unrealistic and esoteric speculation into degrees of intent" which "even those directly involved in genuine efforts to influence governmental action would have difficulty sorting out in their own minds" (Petitioners' Brief at 66) is fallacious and irrelevant because it assumes the precise question to be decided. If defendants' efforts are genuine and the *Noerr-Pennington* doctrine extends to the adjudicatory functions of government then defendants' activities are protected. If defendants' efforts are merely ostensible use of government there is no protection and defendants are liable under the Sherman Act. This is a question of fact which cannot be disposed of on a motion to dismiss for failure to state a claim.

II. The Noerr-Pennington Doctrine Does Not Extend to the Adjudicatory Functions of Government

This Court's decisions in *Noerr* and *Pennington* dealt only with joint approaches with anti-competitive intent, before legislative and executive bodies and officials. In both cases, it was not disputed that the parties genuinely sought to induce governmental action detrimental to their competitors. These two cases, taken together, protect only lobbying, political activity and other similar efforts to induce the passage and enforcement of laws. The rationale for this exemption is that these representative

branches of the government need the information and views of their constituents in order to adequately represent them. Because the government may pass and enforce laws which restrain trade the people should be free to petition government to take such action.

The Courts and administrative agencies acting in an adjudicatory capacity do not have the power to pass or enforce trade restrictive laws, nor do they act in a representative capacity. The function of these bodies is to apply existing legal standards to concrete factual situations in order to resolve individual cases between the parties before the tribunal. Improper uses of the process of adjudication have consistently been condemned.

Where such improper uses are directed at suppressing or destroying competition they are proscribed by the Sherman Act. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172 (1965); *United States v. Singer Manufacturing Co.,* 374 U.S. 174 (1963). In *Singer* this Court held that the Sherman Act applied to a conspiracy among competitors to use patent infringement litigation to suppress competition. In *Walker Process,* the unilateral *enforcement* through litigation of a patent known to be fraudulently obtained with the intent to monopolize the relevant market was held to state a claim under section 2 of the Sherman Act.

The present case is similar to *Walker Process* because the defendants agreed in advance to protest each and every application for common carrier certificates whether or not probable cause for their protest existed. Thus, in both cases the purpose of initiating the action was to use the *process* to restrain trade. *Singer* and other lower

court cases seem to indicate that the existence of an anticompetitive intent or purpose is sufficient to impose liability even where probable cause for litigation is present. This Court need not go so far to affirm this case.

There is no tenable distinction between patent and certificate litigation. Both involve partial monopolies granted by the government to private businessmen giving them the right to conduct business within the legal boundaries of the grant. Both are valuable property rights. Misuse of litigation involving either for anticompetitive purposes results in liability under the antitrust laws.

NAACP v. Button, supra, provides no protection for the defendants' conspiracy. Critical factors existed in *Button* which are not present in the case at bar: (1) the intent and purpose of the NAACP was lawful, (2) the processes of the courts were not being used in an "oppressive, malicious or avaricious" manner (371 U.S. at 443), and (3) the NAACP was engaged in "political activity"—petitioning government for the vindication of the constitutional rights of a minority.

The California Public Utilities Commission and the Interstate Commerce Commission, in the exercise of their licensing function, are engaged in adjudication. *Hanna v. Larche,* 363 U.S. 420 (1960); *Greene v. McElroy,* 360 U.S. 474 (1959); *People v. Western Airlines, Inc.,* 42 Cal. 2d 621 (1954). While these agencies need information which existing certificate holders may provide, such information must be communicated within the procedural and substantive guidelines and for lawful purposes relevant to the adversary proceeding involved. Where a combination implements a program of indiscriminate protests

for the purpose of destroying competition by deterring the filing and prosecution of applications and thereby bring the licensing process to a standstill the adjudicatory process is abused and the Sherman Act violated.

III. Defendants' Conspiracy Is Not Protected by the First Amendment

The First Amendment does not protect the defendants' conspiracy for two reasons. First, the right to petition government is not an absolute right, *Adderley v. Florida,* 385 U.S. 39 (1966), reasonable restrictions upon its exercise are permissible. Second, the right exists only where persons genuinely seek redress for grievances.

One cannot exercise his constitutional rights in a manner and for the purpose of depriving another person of his constitutional rights. *Citizens Publishing Co. v. United States,* 394 U.S. 131 (1969). The defendants may not use their right to free access to the courts and administrative adjudicative bodies to destroy plaintiffs' access to those bodies. Furthermore, defendants may not use their right to petition government to avoid liability under a valid statute proscribing restraints of trade. Cf. *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490 (1949). The case of *NAACP v. Button,* supra, does not protect the defendants because the defendants in the instant case acted with an unlawful purpose, used the process of litigation for an end entirely foreign to its function and because the defendants were not genuinely petitioning government. In *Button* this Court carefully distinguished the conduct of the NAACP from the types of conduct traditionally condemned by the courts: "the oppressive, malicious, or avaricious use of the legal process for purely private

gain" (371 U.S. at 443). The defendants' conduct is clearly in the latter category.

If a balancing test is applied the following considerations should be weighed. On one side, the defendants' right to free access to the courts and administrative adjudicative bodies and the desirability of communication of information to the government at no cost to the government. On the other side, the plaintiffs' right to free access, the strong public interest in enforcement of the antitrust laws, the public interest in effective regulation of the trucking industry and the public interest in preserving the integrity of the adjudicatory process. The result of such a balance requires that the Sherman Act be applied to this case.

The proper test, as applied by the Ninth Circuit may be stated as follows: where it can be shown that a group of competitors combine and conspire to use, regardless of the merits of their case, the judicial *processes* and *procedures* to unreasonably restrain trade rather than seeking that restraint through governmental action a violation of the Sherman Act exists.

Defendants object to such a test as being too vague and uncertain and, therefore, creating a "chilling effect." This test requires the finding of an intent or state of mind for liability to arise as do many other tests in the First Amendment area. (e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).) Furthermore, any incidental restraint arising from a valid statute regulating a subject within governmental power is not sufficient to invalidate the statute. *Younger v. Harris*, 401 U.S. 37 (1971). Since defendants in this case are "hard core" violators they

should not be permitted to assert the purported difficulties which another person acting in good faith might experience. *Adderley v. Florida,* supra.

IV. The Alleged Conspiracy Is Beyond the Control and Expertise of the Commissions

Contrary to defendants' assertions, the commissions are incapable of controlling the alleged conspiracy. First, if the defendants have a First Amendment right to use the adjudicative *process* to restrain trade which immunizes them from liability under the Sherman Act that right would equally protect them from application of any rule or regulation of the commissions proscribing the use of procedures to restrain trade or defeat the power of the commissions to regulate.

Second, if such a rule or regulation were to withstand constitutional challenge it would be unworkable. It would require a long and complex hearing on the issue of standing and would require the commission to examine into difficult questions of fact, concerning purpose and intent, beyond the expertise of the commissions and more appropriate for court determination.

Even if the commissions could control defendants' conspiracy, this Court has consistently held that in the absence of an express exemption or implied immunity the Sherman Act applies to regulated industries. *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963). The Sherman Act applies to this case.

V. Review of Lower Court Authorities

A summary is set forth which indicates that the present case is unique. All prior cases involve situations

where it is clear that the defendants actually intended to induce governmental action detrimental to their competitors.

ARGUMENT

Introduction

First, this case comes to the Court on a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) FRCP. This Court has held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Jenkins v. McKeithen,* 395 U.S. 411 (1969); *Columbia Broadcasting System, Inc., v. Poller,* 368 U.S. 464 (1962). Plaintiffs submit that if a "sham" exception to the *Noerr-Pennington* doctrine exists, then, regardless of whether or not the doctrine extends to the concerted use of judicial and administrative adjudicative processes to restrain trade, the decision of the Court of Appeals must be affirmed. Whether defendants' activities were "mere sham" or "genuine" attempts to induce governmental action of necessity presents a question of *fact* which can only be resolved after plaintiffs have had an opportunity to present evidence to the trier of fact.

Second, petitioners' brief does not confront the case actually alleged in the First Amended Complaint. This they have avoided by arguing a case which assumes that everyone concedes that the defendants' sole activities were genuine attempts to induce lawful governmental action.

This mischaracterization is manifest throughout the petitioners' brief.[6]

The facts of the present case are far different.[7] The complaint alleges a conspiracy to restrain trade and destroy

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[6] 1. ". . . where there is no allegation that defendants' efforts to influence the administrative bodies and courts were other than genuine, ..." Petitioners' Brief, Questions Presented, Question No. 1 at 3. It should be noted that this statement appears for the first time in the Brief. It was not present in the questions presented by the Petition for Certiorari. Compare with Petition for Writ of Certiorari, Questions Presented, Question No. 2 at 3.

2. "There is no allegation that defendants' efforts to influence the PUC, the ICC and the courts have ever been other than genuine, ..."Id. at 13. This statement also appears for the first time in the Brief. Compare Petition for Writ of Certiorari at 7.

3. "In the present case the complaint concedes that there was a genuine intent to influence the ICC and PUC and the reviewing courts in making their determinations in certificate matters." Id. at 20.

4. "The Ninth Circuit conceded that the alleged intent to influence the ICC and PUC was genuine, ..." Id.

5. "The present complaint, like *Pennington,* involves alleged efforts to influence public officials to take certain action within the bounds of their discretionary authority which would have an anti-competitive effect, ..." Id. at 26.

6. "The activities alleged are simply concerted applications to public officials vested with power to take trade-restrictive action." Id.

7. ". . . the defendants' objective of persuading the ICC, the PUC and the courts to draw certain conclusions in the public interest." Id. at 54.

8. "That the defendants made a genuine effort to persuade the ICC, the PUC and the reviewing courts to take certain action is spelled out in the complaint and is recognized by the Ninth Circuit majority." Id. at 65.

[7] Indicative of the clear necessity to mischaracterize the allegations in order to argue the issue they wish to argue rather than the one established by the complaint, defendants have seized upon one subparagraph of the complaint under "Violations" and have characterized it as a "concession" to their contention that the plaintiffs allege only a genuine effort to influence government action. (Petitioners' Brief p. 45.) Even as to that subparagraph (para. 8H(10), Jt. App. p. 10), selective editing was required to achieve the desired language. Defendants have ignored other and related charges made in paragraph 8 A through I. When subparagraph 8H(10) is read in full and in its clear context with the re-

competition directly through the utilization of the forms and procedures of adjudication. It was the program of inexorable opposition—not the resulting determinations of the affected agencies and courts—which was to produce the restraint. As the Ninth Circuit stated "[t]he purpose of defendants' joint activity was not to induce action by the affected governmental agencies, but to preclude it." (Jt. App. 58.) The complaint so alleges. (Jt. App. 4-11.)

This basic mischaracterization by the petitioners defines in stark outlines the fundamental issue of fact raised by the complaint and constitutes cogent evidence that a trial on the merits is required for its resolution.

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mainder of paragraph 8 of the complaint, it is clear that the sole purpose of the combination was to discourage filings and prosecution of applications for rights.

In discussing the opinion of the Ninth Circuit (Petitioners' Brief p. 10), defendants importantly misquote the language of the Court of Appeals which drew a distinction between "administrative *adjudicative* processes" on the one hand and joint efforts to influence legislative and executive actions on the other hand. Since one of the grounds for the Ninth Circuit's ruling was a determination that certificate proceedings were adjudicative rather than legislative in nature (Jt. App. p. 50), defendants' omission of the word "adjudicative" from the language of the court is but a further attempt on their part to argue this case as though mere administrative action rather than the adjudicative process is what defendants were employing in their scheme of restraint. The Ninth Circuit's opinion clearly makes the distinction between pure administrative actions and the protectable interests involved there, and administrative and court adjudicative processes and functions and the different interests there at stake. (Jt. App. p. 52 n.6.)

I. THE COURT OF APPEALS' DECISION MUST BE AFFIRMED, EVEN IF THE NOERR-PENNINGTON DOCTRINE EXTENDS TO CONCERTED USE OF JUDICIAL AND ADMINISTRATIVE ADJUDICATIVE PROCESSES, BECAUSE THE CONDUCT ALLEGED IN THE COMPLAINT IS WITHIN THE "SHAM" EXCEPTION DECLARED IN NOERR

In *Eastern Railroad Presidents Conference v. Noerr*, *supra*, this Court enunciated an exception to the general rule that an unlawful purpose may bring otherwise lawful means within the proscriptions of the Sherman Act. See *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). In *Noerr*, the Court held that the Sherman Act should not be applied to "mere attempts to influence the passage or enforcement of laws," (365 U.S. at 136), even though motivated by an intent to restrain trade and destroy competition. Three reasons were given for this exception.

(1) Such activities are "political" and "essentially dissimilar" from the agreements traditionally condemned by the Sherman Act.

(2) Application of the Act to such activities "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade" by preventing the people from communicating their wishes to their representatives in government.

(3) Application of the Act to such political activities would raise important constitutional questions.

The *Noerr* case arose out of a fierce public relations battle between the railroad and trucking industries over long-haul freight business. The truckers sued the railroads alleging that the defendants had conspired to restrain

trade in and monopolize the long-haul freight business. The alleged conspiracy involved a publicity campaign, aimed at the legislatures of several states and the Governor of Pennsylvania, designed to promote the enactment of laws and law enforcement practices detrimental to the trucking industry and favorable to the railroad industry. The railroads' campaign was "highly successful" 365 U.S. at 144, securing among other things the veto of a "Fair Truck Bill," which would have increased maximum weight limits for trucks using state highways, by the Governor of Pennsylvania.

The plaintiffs sought broad injunctive relief but limited their claims for damages to the loss of business resulting from the Governor's veto. Id at 130. Thus, the only predicate for damages was valid governmental action which was protected from liability under the antitrust laws. *Parker v. Brown,* 317 U.S. 341 (1943); *United States v. Rock Royal Cooperative, Inc.,* 307 U.S. 533 (1939.)

This Court found that "all of the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws" (365 U.S. at 142.) Thus, having concluded that all the activities, including the publicity campaign using the so-called third party technique, constituted solely political activity, the immunity stood despite the fact that the truckers sustained some *direct injury* as an *incidental effect* of the railroads' campaign to influence governmental action. The guidelines of *Noerr* clearly show that genuine efforts to influence the passage and enforcement of laws are immune though such efforts may have the incidental effect of direct injury to competitors.

The *Pennington* case merely affirms the principles established in *Noerr*. *Pennington*, like *Noerr*, involved concerted attempts to use lobbying and political pressure in order to influence members of the executive branch of government. As such, *Pennington* neither enlarges nor shrinks the Sherman Act immunity created in *Noerr*.

In *Pennington*, a small coal company charged (in a counterclaim to a union action) that the United Mine Workers Union had conspired with certain large coal companies to drive smaller companies out of business in exchange for higher wages for union members. The *Noerr* issue arose from an agreement between the union and large companies to approach the Secretary of Labor and secure the establishment of a minimum wage rate, under the Walsh-Healy Act (41 U.S.C. §§ 35, et seq.) which would have prevented small coal operators from selling to the Tennessee Valley Authority (TVA) "term contract" market. Joint approaches were also made to solicit the purchasing agents for the TVA to curtail their purchases in the "spot-market" which was largely exempt from the minimum wage requirements of the Walsh Healy Act. In short, the *Noerr* issue involved strictly lobbying of and political pressure on members of the executive branch of government to induce governmental action detrimental to the smaller, non-union coal companies. These activities involved none of the characteristics associated with the traditionally condemned restraints enumerated in the *Noerr* opinion. Rather they were "political activity" and, therefore, clearly within *Noerr's* protection.

The *Pennington* case ruled joint efforts to influence public officials were shielded from the Sherman Act by *Noerr*, "regardless of intent or purpose . . . even though

intended to eliminate competition." (381 U.S. at 670.) *Pennington* did not hold, nor did *Noerr*, that use of governmental adjudicatory machinery to harass and deter competitors was permissible where the intention was to employ such machinery as the means of restraint rather than government action. The *sine qua non* of immunity in both *Noerr* and *Pennington* is that the restraints desired must genuinely be sought by the actors to be achieved through government action.

In both of these cases the plaintiffs (counterclaimants in *Pennington)* sought damages for injuries resulting directly from action taken by governmental officials. In both it was conceded that the antitrust defendants actively and honestly sought to induce government to take action prejudicial to their competitors. The "genuineness" of these efforts was not disputed.

This Court recognized in *Noerr*, however, that governmental processes might be involved, in appearance only, in the creation of a restraint of trade and that such appearance should not serve to immunize a conspiracy from normal Sherman Act standards. In the Court's language:

> "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S. at 144.

Plaintiffs have alleged in paragraph 8 of the complaint (Jt. App. 4-10) that defendants' plan and the implementation of it were aimed directly at competitors and not at the agencies; that to influence the agencies and the courts

was not what the defendants sought to achieve; that the result of defendants' conspiracy was to force competing truckers to refrain from filing any applications for certificated rights, and, as to those who filed, to force them to abandon or compromise their applications through settlement on defendants' terms.

Questions of whether or not defendants' activities were "political" within the meaning of *Noerr* are immaterial if defendants have not restrained trade through government decisions or genuine efforts to obtain them. There is no dispute over this principle. Not all combinations which result in a restraint of trade are *Noerr*-protected simply because their restraint involves some form of government procedure.

The sum total of defendants' arguments must be that the sham exception does not exist. By definition that exception must include some government involvement. Given the premise that the intention was to restrain trade, defendants argue that the difficulty which they would encounter in "sorting out in their own minds" whether they were genuinely seeking to influence government or seeking to create a restraint using government as a guise only, must be resolved in their favor. This is no more than suggesting a conclusive presumption that if government is employed at all, no sham exception is permissible because of the "chilling effect" which would result from the difficulty of "sorting out" what their intent truly is. (Petitioners' Brief p. 66.)

It is necessary to determine precisely *how* government is involved, and *how* its processes are used. Where a government agency is genuinely petitioned and a restraint

is the product of a government decision or the genuine attempts to influence a decision, then—but only then—the combination is not subject to the Sherman Act even if its members' actual motives were to restrain competition. The need to protect the flow of information necessary for the government to act in its "representative capacity" depends upon leaving unfettered the channels through which those who are governed may petition or communicate with those who govern. The Court in *Noerr* recognized that these values outweigh the values of declaring illegal combinations which restrain trade by using governmental processes. Undesirable as such combinations are, to illegitimize their activity in order to protect the trade of their target competitors would have the dangerous side effect of impairing the government's ability to govern on the basis of the fullest possible knowledge of what is at stake. Thus, even where the intent and the effect of the conspiracy are clearly to damage its competitors, where they are effected through a genuine seeking of governmental action, such petitioning vitiates the otherwise illegal restraint, at least for antitrust purposes.

Where a conspiracy to restrain trade does not in fact use governmental processes to obtain government action, however, the values inherent in protecting an exchange of information and access to government are not present, and the need to forego an examination of the conspiracy's intent and methods of restraint does not arise. Where governmental processes are not used in a genuine effort to influence government, a conspiracy to restrain trade is as subject to the antitrust laws as it normally is where there is no use of governmental processes at all.

Given this distinction between genuine and sham attempts to influence government, it remains only to be applied to the allegations in the present case. Defendants contend that their actions and purpose were primarily to influence governmental agencies to deny plaintiffs' applications or otherwise to rule in favor of defendants, and that the time, money and effort necessary merely to confront defendants' conspiracy were nothing more than incidental adverse effects of their allegedly genuine efforts to influence government, and thus only incidentally served to deter plaintiffs from access to governmental agencies.

Plaintiffs contend that defendants' activities and purpose were, on the contrary, directly to suppress and eliminate competition from plaintiffs and other potential competitors, not by attempting to influence the commissions to deny applications, but by preventing plaintiffs and others from seeking carriage rights, and that in the course of doing so, the defendants incidentally influenced some government decisions. The Ninth Circuit opinion states the correct proposition:

> "Since all applications were to be opposed, it is irrelevant that a valid basis existed for opposing some applications. Nor is it relevant that the opposition was as effective as defendants could make it; *mere token opposition would not have the requisite deterrent effect.*
>
> "The purpose of this alleged conspiracy was to inflict injury upon competition directly by defendants' own joint activity. Inevitably, *given the nature of the means employed,* defendants' activity would also injure competitors indirectly by influencing rulings of the agencies and the courts. Here, however, that indirect injury is merely incidental; and its occur-

> rence cannot justify application of the *Noerr-Pennington* defense. As a practical matter, to hold otherwise would make the 'sham' exception inapplicable to any conspiracy to restrain trade cloaked with the mantle of a campaign to influence governmental action. Cf. *Noerr, supra,* 365 U.S. at 143-144." (Jt. App. 59.) (Emphasis supplied.)

While defendants have not placed physical roadblocks in plaintiffs' path to the commissions and courts, they have created financial roadblocks of even greater deterrent effect.

Several elements of defendants' plan stand out in particular and support this interpretation. These elements are (1) defendants' publicity directed at competitors, not at the agencies or courts, customers or the public, announcing that every application would be protested and appealed to the fullest extent, and that huge sums of money were available to conduct the defendants' program; (2) the decision by defendants, made in advance of the filing of applications, to protest every application, indiscriminately, without knowledge of its contents or merits; and (3) protesting by defendant carriers who had no immediate interest in a given application other than that it affected the interests of a co-conspirator.

These unique elements are not present in a plan which genuinely seeks to influence government in the manner done by the railroads in *Noerr* or the NAACP in *Button*. Inclusion of such factors in a legitimate plan to influence government, even though anticompetitive in nature, is difficult to imagine. If these and similar factors alleged by plaintiffs do not make out a "sham" cause of action, the sham exception to *Noerr* is virtually meaningless.

Inasmuch as establishing a barrier, cutting off access between the plaintiffs and the commissions, was to be achieved through the mechanism of indiscriminate, blanket opposition, the defendants had the incidental opportunity of attempting to defeat some of the applications on their merits. As a result, defendants seize this point in their brief and attempt to argue that the sum of their actions represents nothing less than genuine efforts to defeat potential competitors' applications by influencing commission decisions. They state that "There is no allegation that defendants' efforts to influence the PUC, the ICC and the courts have ever been other than genuine" (Petitioners' Brief p. 13); that the "defendants' participation did influence commission decisions is specifically conceded [in the complaint]" (Petitioners' Brief p. 45); and that "the defendants made a genuine effort to persuade the ICC, the PUC and the reviewing courts to take certain action is spelled out in the complaint and is recognized by the Ninth Circuit majority." (Petitioners' Brief p. 65.) Defendants attempt to conclude from these "admissions" and "concessions" that the complaint charges them only with a restraint produced through their influence over the commissions and the courts.

Defendants have continually misunderstood and misconstrued what is complained of in this case. The complaint alleges that defendants' intent and activities were to use government processes—not to genuinely seek to influence government officials—but as a lesson to plaintiffs and others that attempts to obtain carriage rights would be economically futile. To the extent that applications reached the commissions, of course, there was no reason not to try to be successful on the merits, to make the best

case the facts would allow, and hopefully influence commission decisions. But this was an incidental feature of a plan whose objective, function and effect was designed not to influence government officials, but to clog and encumber governmental processes, and thereby deter applicants even from reaching government officials.

Defendants implicitly recognize that the damage done by their conspiracy resulted not from attempting to influence government but from clogging government processes and thereby preventing plaintiffs from seeking rights. That plaintiffs and other truckers have in fact been deterred by defendants' conspiracy from filing applications has never been subject to dispute. The record on this matter speaks for itself. Plaintiffs and other truckers sought and obtained rights consistently until they were faced with the prohibitive costs in time and money resulting from defendants' joint agreement to file protests. It was defendants' conspiracy, implemented and publicized, which abruptly ended applications by plaintiffs and other competitors of defendants. No other conclusion is possible under the pleading.

Defendants also recognize that it was the prohibitive costs of meeting their protests which made it impossible for truckers to prosecute new applications. They simply argue that there is cost inherent in any protest proceeding and that cost as a deterrent factor, therefore, cannot serve as evidence of a direct restraint or in any other way serve to illegitimize their protests. Defendants' argument simply misses all questions of factual variance which distinguish a genuine from a sham attempt to influence government and attempts to characterize the

complaint as one which merely attacks legitimate protests and the costs involved there. It is clear, as plaintiffs have alleged, that the protests were made to prevent applicants even from "making their wishes known" to agencies and courts. As with all conspiracies, their individual power was transformed into immeasurably greater power merely through the accumulation and joint exertion of purpose and resources. "Any" protest certainly is not apt to entail the same kind or extent of expense to an applicant or to constitute the deterrent which defendants' combined, blanket protests entailed. The power exercised by a conspiracy to prevent access to the commissions is not inherent to the regulatory system. This Court has tolerated the restraints of conspiracies only in the narrowest of circumstances, where the protection of countervailing values simply left no alternative. Thus, in *Noerr,* this Court was careful to state that where the conditions for *Noerr* protection are not present—where the conspiracy is not shown *as a matter of fact* to effect its restraints through genuine efforts to obtain governmental decisions—the constitutional values of protecting governmental decision-making and access thereto are absent and the direct restraint resulting from the conspiracy's activities is subject to the Sherman Act.

To permit defendants' incidental attempts to influence government to justify their blocking of plaintiffs' access to rights would be to permit the tail to wag the dog. If such were the case, a single genuine protest before a government agency would constitute a license to obstruct an unlimited number of applicants even from attempting to obtain regulated rights. This, we believe, neither *Noerr, Pennington, Button* nor the Constitution will permit. The

sham exception in *Noerr* itself prevents such a possibility. Whether defendants' activities in this case were essentially genuine or ostensible attempts to influence government are questions of degree and of evidence to be weighed by the trier of fact. The only questions before the Court are (1) whether as a matter of law a trier of fact is permitted to find that defendants attempted to use government processes, not in a genuine attempt to influence government decisions, but in order directly to restrain competition, and (2) whether plaintiffs have alleged such to be the case here. The fact that a sham exception to *Noerr* exists as a matter of law is not subject to dispute. As for plaintiffs' allegations, we believe it is clear that they have stated that the purpose and effect of defendants' conspiracy was to prevent competitors from acquiring rights by use of government processes, not by attempting to influence government decisions. For this reason, plaintiffs reiterate that they have the right as a matter of law to prove to a jury that defendants' restraints were imposed not through attempts to influence the agencies and courts, but by interposing their conspiracy between plaintiffs and these forums.

In misconstruing the thrust of the allegations of the complaint, defendants have also misconstrued the relevancy of intent and purpose in this case. They cite language from *Pennington* which states that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose . . . joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." (381 U.S. at 670.) From this they argue that their intent is irrelevant in this action for all purposes.

In so doing, they have begged the very question presented—namely, whether their plan of action was a genuine attempt to influence government officials, or merely a direct obstruction of competitors. It is clear from *Noerr* and *Pennington* that intent and purpose to restrain competition become irrelevant only if it is shown that there was in fact a genuine attempt to influence government officials. Once that is shown (and there were no allegations or issues to the contrary in those cases), the conspiracy's ultimate intent becomes irrelevant. But the threshold question as to whether defendants' conspiracy was genuine or sham must first be asked, and to answer this question it is relevant to show not only that their actions, viewed objectively, constituted a mere ostensible use of government processes, but also that they intended their actions to be ostensible rather than genuine. If, for instance, plaintiffs could produce a letter authored by defendants stating that "In entering massive protests before the commissions, our intended objective is to deter further applications, not to influence commission decisions," that stated intent would be relevant to a showing that defendants' actions were in fact a sham rather than a genuine use of government. Plaintiffs recognize it is inappropriate to discuss evidence. The above example is given solely to demonstrate that the issue is one of fact. If their activities are found to be genuine attempts to influence government, under *Pennington* their ultimate intent to damage plaintiffs is irrelevant. But if their activities are found to be a mere ostensible attempt to influence government, to disguise their direct restraint of competition, the protections afforded by *Noerr* do not apply and defendants' intent to damage plaintiffs is

merely one factor among many in proving an antitrust violation.

Defendants' attempt to characterize their activities as genuine within the meaning of *Noerr* misses other distinctions between *Noerr* and the present case as well. In *Noerr*, there was no allegation or evidence that the thrust of the defendants' activities was other than to influence legislation or other governmental action. In *Noerr* the Court made clear that even including the third party publicity campaign, "all of the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws." (365 U.S. at 142.) There was some direct damage to competitors but the Court made it clear that direct damage resulting as an incidental effect of genuine efforts did not remove the exemption. Contrary to *Noerr*, the complaint pleads that defendants' plan was not to restrain trade by genuinely seeking government action, that the restraint was their program of deterrence and that indirect damage that resulted from their influencing decisions was but an incidental effect of the plan of deterrence.

In *Pennington* and *Button* too, there were no allegations that any interested parties were restrained from access to the government officials involved. In fact, in *Button* the Court found for the NAACP in order to protect a group's access to government and their right to make their wishes known—the very thing for which plaintiffs are seeking protection in this case.

The importance of protecting plaintiffs' access to the PUC and the ICC is nowhere better illustrated than in defendants' own brief. In arguing that the commissions

must exercise great discretion in adjudicating applications for rights and transfers defendants point out the need for regulatory agencies to act on the basis of a wide range of information from those affected by their decisions. According to defendants, this need is so compelling that existing certificate holders are elevated to a position of public trust, vindicators of the public interest.

> "In carrying out their function of public trust in participating in certificate proceedings, existing certificated carriers can furnish not only factual information readily available to them respecting their respective operation, but information and opinions based on practical experience on such subjects as the effect upon service efficiency arising from a proliferation of certificates, the reaction of given segments of the shipping public to the presence of a new carrier, the problems of holding patronage, the manner in which new traffic can be generated, and the impact of varying degrees of competition upon rates. These and other subjects all have significance in assisting the commission to act in the public interest.
>
> "The position which existing certificate holders occupy in protesting certificate applications may be analogized to that of a 'private attorney general.'" (Petitioners' Brief p. 47.)

According to defendants, all of this information is relevant in answering the question "does the public convenience and necessity justify the granting of this certificate? The complaint, however, alleges that it was the purpose of defendants' conspiracy to permit as few applications and as little information from competitors as possible to reach the agencies for their consideration—to prevent the above question from being asked, let alone

answered. How is it possible, then for the commissions and courts to answer these questions of public interest at all, much less accurately, if many of the businesses affected are precluded or deterred, by an anticompetitive combination seeking such deterrence, even from applying and thereby making essential information known? Defendants' argument cited above is made in order to support their contention that they must be protected in their access to the commissions even if it takes the form of a conspiracy against plaintiffs' access to the commissions. Plaintiffs agree that defendants should be ale to make their wishes known to governmental bodies involved even if their ultimate intent is to defeat plaintiffs' applications and thus eliminate competition. But defendants have done something more, and in so doing have gone beyond the protection of *Noerr*, *Pennington*, and other authorities cited by defendants. In conspiring to preclude all but themselves from access to the government, defendants have conspired to defeat the discretionary system which they espouse at great length in their brief; have conspired to defeat the constitutional values of exchange of information and the right to petition valued in *Noerr* and *Button*; and have conspired to defeat the individual rights of competitors to carry on their businesses free from the contrived restraints imposed upon them not by government decisions or the attempts of defendants to obtain them, but by a massive combination standing between plaintiffs and the governmental agencies involved.

Certainly not every form of government involvement can serve to cloak otherwise direct restraints with *Noerr* immunity. One of the premises of the sham exception is

that some form of petitioning of government could be shown. Yet the court recognized that a question of fact remains as to whether this petitioning might be "ostensible" rather than "genuine."

Even if one assumes, as defendants argue, that public officials involved in judicial determinations constitute "government officials" who might be genuinely petitioned by a conspiracy, nonetheless it is the kind of behavior and degree of restraint which determines whether defendants' conspiracy was a genuine effort to influence government, or was essentially a mock attempt to do so with the genuine effort directed at deterring competitors from seeking rights. Only the trier of fact can answer these questions.

Defendants have taken the position that the "sham" exception is limited to cases in which there is direct interference with *business relationships* of a competitor and would limit this term to the relationships between the competitor and his suppliers or customers. (Petitioners' Brief p. 62; Petition for Writ of Certiorari p. 20.) The implication is that direct interference between plaintiffs and the commissions cannot constitute "mere sham" regardless of the method used to cut off access to the commissions. It is clear, however, that a business relationship does exist. Defendants directly interfered with the process of market entry—not by seeking government action—but by interposing their conspiracy between government (the sole source of the right to engage in the common carrier business) and the businessman. Such interference is indistinguishable from interference, with anticompetitive intent and purpose, with the relationship between a banker and a businessman in need of a line of credit to commence or expand a business.

In *Noerr* and *Pennington* the defendants sought to use the functions of government for their anticompetitive purposes. They sought to *induce the government to act.* The railroads in *Noerr* and the union and large mine owners in *Pennington* were found to have made a genuine effort to influence legislative and executive action. This was not disputed.

In the present case, such a dispute is at the heart of plaintiffs' action. The courts and commissions, though not so intended, have been rendered useless to plaintiffs and other competitors of the defendants by the employment of an overwhelming combination of capital and personnel devoted to the purpose of foreclosing access to these bodies. Certainly *Noerr* does not protect the plan of combined individuals to use the forms and procedures of government in order to exclude competitors from access to government.

II. IN ADDITION TO THE SHAM EXCEPTION DEFENDANTS ARE LIABLE BECAUSE THEIR ACTIVITIES ARE NOT PROTECTED BY NOERR-PENNINGTON OR BUTTON, AND, SINCE THEY CONSTITUTE MISUSE OF ADJUDICATORY PROCESSES FOR ANTICOMPETITIVE PURPOSES, FALL WITHIN THE RULES EXPRESSED IN WALKER PROCESS AND SINGER

A. Defendants' activities are not protected by Noerr-Pennington because they are critically different from the behavior of defendants in those cases

The first part of defendants' argument (Petitioners' Brief p. 29) deals with the so-called "essential dissimilarity" point made in the *Noerr* decision. We believe that defendants have treated this point with conspicuous superficiality and have failed to fully deal with the critical areas in which their own behavior is claimed by them to be similar to that of the *Noerr* defendants.

In *Noerr* the Court expressly identified the factors necessary for "essential dissimilarity" to exist between behavior condemned by the Sherman Act and that protected in *Noerr,* an agreement to jointly seek legislation or law enforcement detrimental to competitors (365 U.S. at 136). Defendants argue merely that "influencing public officials," as used in *Pennington,* is the sum total of the charges against them. Thus, they reason, since judges and commissioners are public officials who conduct adjudicative proceedings, defendants' behavior is within the protection of the *Noerr-Pennington* cases. The reasoning continues that, based upon the foregoing premise, such activities cannot be those traditionally prohibited by the Sherman Act because the activities in the *Noerr* and *Pennington* cases were not held to be prohibited. Defendants cannot get home that easily. We submit that defendants' analysis of this point is wrong and leaves a huge void in their consideration of comparative behavior in the context of the function of government involved.

First, when government officials act in an adjudicatory capacity as contrasted with those who act in a representative capacity, "there is a marked difference between the processes by which they arrive at decisions, the materials upon which they may properly rely and the atmosphere consistent with effective performance of their respective functions." (Jt. App. 52.)[8] As will be seen in the discus-

[8]As an example of the condemnation of lobbying before the ICC with respect to a contested proceeding, the ICC Canon of Ethics prescribes the following:

> "8. Private communications with the Commission. In the disposition of contested proceedings brought under the Interstate Commerce Act [49 U.S.C.A. §§1 et seq., 301 et seq., 901 et seq., 1001 et seq., 1231 et seq.] the Commission exercises

sion of the First Amendment, the interests protectible, as well as rules of access, are also different.

Second, the case at bar deals with a conspiracy to restrain trade—not by genuinely seeking favorable government decisions—but by intentionally imposing procedural barriers thus preventing and deterring others from free access to government processes.

Third, the case at bar deals with an agreement on the part of defendants to give up their trade freedom, a practice commonly condemned by the Sherman Act, whereas in *Noerr,* no such agreement was present.[9] Defendants

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quasi-legislative powers, but it is nevertheless acting in a quasi-judicial capacity. It is required to administer the Act and to consider at all times the public interest beyond the mere interest of the particular litigants before it. To the extent that it acts in a quasi-judicial capacity, it is grossly improper for litigants, directly or through any counsel or representative, to communicate privately with a commissioner, examiner or other representative of the Commission about a pending cause, or to argue privately the merits thereof in the absence of their adversaries or without notice to them. Practitioners at all times should scrupulously refrain in their communciations to and discussions with the Commission and its staff from going beyond ex parte representations that are clearly proper in view of the administrative work of the Commission."

[9]As this Court pointed out in discussing the principal issues of the *Pennington* case, such agreements strike at the very roots of the antitrust policy:

> "[f]or the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy." 381 U.S. at 668.

This same point was made in *Noerr* where the Court declared that defendants' activities there bore:

have correctly pointed out the *Noerr* decision did not hinge solely upon the essential dissimilarity between antitrust violations and political petitioning. There were two other factors, specifically (1) the substantial impairment of the abilities of legislative and executive branches acting in a representative capacity to receive information,[10]

". . . very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements." (365 U.S. at 136.)

Because the complaint alleges each defendant was bound to oppose each application filed anywhere by any carrier, this necessarily included applications of members themselves. This point is conceded in Petitioners' Brief, p. 14 n. 4. It is clear that each defendant gave up its own trade freedom as well as agreeing to take trade freedom away from carriers who were not members. (Jt. App. 5 para. 8B, p. 7, para. 8F.) In the common carriage business the first and indispensible step required to engage in trade is the filing of an application for rights to do so. This decision is not a political or even a regulatory decision, but strictly a business decision made by a businessman without anyone's prior approval. However, when such a carrier binds himself to other carriers in a scheme designed to limit not only his own freedom to file applications, but the freedom of others, clearly it is a "similar arrangement" to those which the Sherman Act intended to condemn. Each defendant agreed that it would share in paying for the prosecution of protests, even against itself, should it decide it needed more rights. Although the complaint alleges no agreement that defendants would refrain from filing applications, it is clearly a permissible inference that once having jointly agreed to finance protests on *all* applications, there was an agreement not to seek further rights. Even if such inference were not permitted, the economics of the agreement itself placed a great impediment, including the weighing of the interests of the other defendants, in the path of the exercise of the trade freedom of defendants as far as the filing and prosecution of applications for rights are concerned.

[10]In the language of *Noerr*:

"In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of gov-

and (2) the possible impairment of the constitutional right to petition by allowing Sherman Act application.[11] For all of these reasons, the Court concluded as follows:

> "For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." (365 U.S. at 138.)

The behavior of defendants here was critically and importantly different in nature from that of the defendants in *Noerr*. The activities here were aimed and directed at competitors—not at government—and the forum of government used was a different one than in *Noerr*. It will be clear after consideration of defendants' conduct in the context of the function of government they chose to use to restrain trade, when measured against the principles of *Noerr, Button* and the patent cases, that applica-

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ernment act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." (365 U.S. at 137.)

[11] In the language of *Noerr*:

"Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above." (365 U.S. at 137-38.)

tion of the Sherman Act is required. This is so because in the context of adjudicatory forums, the processes and procedures may not be used for the purpose of restraining trade.

Noerr and *Pennington* protect only lobbying, political activity and similar forms of petition aimed at securing the passage and enforcement of laws. In *Noerr* the Court was precise in defining the exception to the Sherman Act. The Court's language clearly demonstrates that it was dealing with a question of substantial impairment of the power of government to take action through its legislative and executive officers (365 U.S. at 137), and with "...the whole concept of representation..." and with "the ability of people to make their wishes known to their representatives." (365 U.S. at 137.)

Throughout the opinion, the Court emphasized that it refrained from applying the Sherman Act to activity which was political in nature and which involved the right of petition to the legislative and executive branches of government. The Court stated no fewer than eight times that it did not intend to interfere with the legislative or executive passage and enforcement of laws.[12]

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[12] 1. "We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon the *mere attempts to influence the passage or enforcement of laws.*" (365 U.S. at 135.) (All emphasis added in this footnote.)

2. "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to *persuade the legislature or the executive to take particular action with respect to a law. . . .*" (365 U.S. at 136.)

3. "And we do think the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that Sherman Act forbids associations *for*

At no time, however, did the Court state or imply that it could not or would not control, investigate, or sanction misuses of processes within the courts themselves or within agencies which exercise judicial powers and over which the courts have long exercised the power of judicial review. The court in *Noerr* made no such statement because no such issue was presented in that case, and because to do so in any event would be to overturn well established law which has permitted—indeed compelled—courts to guard with utmost care the right to fair and full hearings in adversary proceedings. Guarding against a misuse of such processes in the courts and administrative agencies has traditionally been considered not to infringe upon the constitutional right to petition or the functions of other branches of government. The courts have thus not refrained from applying statutory or common law remedies where such abuse exists, no matter what the purpose of such abuse, antitrust or otherwise.

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the purpose of influencing the passage or enforcement of laws." (365 U.S. at 137.)

4. "For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads *at least insofar* as those activities comprised mere solicitation of governmental action with respect to the *passage and enforcement of laws.*" (365 U.S. at 139.)

5. "The right of the people to inform their representatives in Government of their desires *with respect to the passage or enforcement of laws* cannot properly be made to depend upon their intent in doing so." (365 U.S. at 138.)

6. "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, *all of the evidence* in the record, *both oral and documentary*, deals with the railroads' efforts to *influence the passage and enforcement of laws.*" (365 U.S. at 142.)

7. "No one denies that the railroads were making a genuine effort *to influence legislation and law enforcement practices.*" (365 U.S. at 144.)

8. "That (Sherman) Act was not violated by either the railroads or the truckers in their respective campaigns *to influence legislation and law enforcement.*" (365 U.S. at 145.)

Plaintiffs believe that the Court in *Noerr* clearly and unequivocally defined what it meant to protect. It called the activities political activity and lobbying. Plaintiffs believe that the Court meant nothing other than the plain meaning those words impart. When taken together with the facts of the case and descriptive passages of activities in the *Noerr* opinion, they are not subject to semantic disputes. This Court meant to protect only lobbying and political activities as they are commonly known and accepted in their traditional roles within the representative branches of government.

B. Defendants' activities are subject to the Sherman Act as demonstrated by the patent antitrust cases

The misuse or abuse of judicial procedures for anti-competitive purposes constitutes a violation of the Sherman Act, and has been condemned by this Court in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) and *United States v. Singer Manufacturing Co.*, 372 U.S. 174 (1963), as well as by a number of lower court decisions in the patent litigation and other contexts: *Clapper v. Original Tractor Cab Co.*, 270 F.2d 616 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416 (10th Cir.) *cert. denied*, 344 U.S. 837 (1952); *Lynch v. Magnavox Co.*, 94 F.2d 883 (9th Cir. 1938); *United States v. Krasnov*, 143 F.Supp. 184 (E.D. Pa. 1956), *affirmed*, 355 U.S. 5 (1957); *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F.Supp. 199 (D. N.J. 1951), *appeal dismissed*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953).

The patent cases impair the right of access to courts to a much greater degree than is required by the affirm-

ance of the case at bar. This is apparent from a reading of the opinions themselves and has been articulated in the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) at 248 as follows:

> "Accordingly we make the following recommendations: a. Where it is shown that an infringement suit has, in fact, been brought as an integral part of an agreement or plan to violate the antitrust laws and that the defendant sustained resulting damages, treble damages for antitrust violation should be recoverable, whether or not there was a colorable claim of infringement."

The pleadings in this case are limited to the use of adjudicatory processes to restrain trade. Plaintiffs allege that defendants did not attempt to restrain trade by obtaining favorable decisions. Therefore, it is not necessary in this case to go as far as *Singer* and other cases discussed below. In this case, the defendants' agreement was to protest applications for which there was no probable cause for opposition as well as protests with probable cause. This agreement was made in advance of the filing of applications or knowledge on the part of defendants whether any given protest would have probable cause. It was to extend to each and every application on file or thereafter to be filed before the commissions. The purpose of the agreement was to foreclose access to operating rights by intimidating competitors with the threat of ruinously difficult, expensive and exorbitant opposition in adjudicatory proceedings. The predation in this case is unprecedented and, therefore, not directly analogous to any prior case known to plaintiffs. Either *Singer* or *Walker Process* is sufficient authority to sustain a ruling

favorable to plaintiffs because they go much further in condemning what more nearly approaches legitimate use of adjudicatory forums of government for anticompetitive purposes than does the conduct of defendants in the present case. However, the case at bar more closely resembles *Walker Process* than *Singer* and other lower court patent-antitrust cases.

In *Walker Process,* the defendant was alleged to know of the falsity of its claims before the Patent Office. From this it followed that the patent was fraudulently obtained and the infringement suit was brought without probable cause. In effect, the defendants were using the *processes* of the courts to restrain trade.

Singer appears to stand for the broader proposition recommended in the Attorney General's Report quoted above at 51. It held that a combination of competitors, which sought to suppress competition and monopolize trade, through the prosecution of infringement actions before the courts and agencies violated sections 1 and 2 of the Sherman Act even though probable cause existed to support this litigation. Even if *Singer* is read narrowly to require the absence of probable cause to constitute a violation, it is still ample authority to support this case. There is no need, for the purposes of this case, for the Court to resolve any ambiguity in the *Singer* case. We respectfully suggest that this should be reserved for a case which directly presents the issue.

In the leading case, *United States v. Singer Manufacturing Co., supra,* Singer conspired with two other companies to prevent the importation into the United States

market of Japanese competitors' sewing machines. The conspiracy and attempt to monopolize were accomplished in two steps. First, the defendants joined interests by withdrawing opposition to the patent applications filed by each company so that the broadest possible claims could be obtained under each patent; and then cross-licensing and assigning the patents to Singer so that it could enforce them against Japanese competitors in the American market. Singer then instituted a program of infringement actions in the courts and protest proceedings before the United States Tariff Commission, a quasi-judicial agency. (374 U.S. at 187-188.)

This Court held that the conspiracy and the proceedings taken pursuant to it were in violation of the Sherman Act. The Court recognized that cross-licensing agreements were not, standing alone, violative of the antitrust laws, but held that when such agreements were made to restrain competition they ran afoul of the Sherman Act.

> "Here the patent was put in Singer's hands to achieve the common purpose of enforcement 'equally advantageous to both' Singer and Gegauf and to Vigorelli as well. What Singer had refused Vigorelli, i.e., acting 'in concert against others' was thus achieved by the simple expedient of transferring the patent to Singer.
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> "Thus by entwining itself with Gegauf and Vigorelli in such a program Singer went far beyond its claimed purpose of merely protecting its own 401 machines—it was protecting Gegauf and Vigorelli, the sole licensees under the patent at the time, under the same umbrella. This the Sherman Act will not permit.
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> . . . .

> "The fact that the enforcement plan likewise served Singer is of no consequence, the controlling factor being the overall common design, i.e., to destroy the Japanese sale of infringing machines in the United States by placing the patent in Singer's hands the better to achieve this result. It is this concerted action to restrain trade, clearly established by the course of dealings, that condemns the transactions under the Sherman Act," (374 U.S. at 193-195).[13]

Singer was followed by this Court's decision in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., supra,* decided in 1965 after the *Pennington* case. In *Walker Process,* the plaintiff, Food Machinery, brought an infringement action. The defendant counterclaimed under section 2 of the Sherman Act alleging that Food Machinery had obtained its patent by means of actual fraud on the Patent Office and was using the patent to monopolize the relevant market by threats of infringement suits and the actual prosecution of the infringe-

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[13]It is incredible that, in seeking to distinguish the *Singer* case from the case at bar, the defendants should use the quotation from the concurring opinion of Mr. Justice White which appears at pages 57-58 of petitioners' brief. If the words "patents," "prior art," and "office" are replaced by the words "certificates," "applications" and "commissions" and the stated public interest in patents replaced by the public interest protected by regulation by the trucking industry, Mr. Justice White would be speaking of the case at bar. It is all the more incredible that defendants should emphasize the public interest in patents and the evils of subordinating that interest to private ends when they have consistently asserted in the courts below that the difference between patent litigation and certificate litigation is that no public interest is involved in patents whereas certificates are permeated by the public interest.

In fact, Mr. Justice White, in his concurring opinion, held that there were two independent grounds upon which the Sherman Act was violated: the agreement to withdraw from the interference proceeding *and* the conspiracy to jointly enforce the patents to suppress competition (374 U.S. at 197).

ment suit against Walker Process. The district court dismissed the counterclaim. This Court unanimously reversed the dismissal and remanded for further proceedings. Mr. Justice Clark, speaking for the court, held that the *enforcement* of the patent, by litigation would violate section 2 of the Sherman Act if the other elements of a section 2 case were present. (382 U.S. at 175.) In response to arguments that the counterclaim sought to cancel or annul the patent and, therefore, was properly dismissed, Mr. Justice Clark stated:

> "Walker counterclaimed under the Clayton Act, not the patent laws. While one of its elements is the fraudulent procurement of a patent, the action does not directly seek the patent's annulment. The gist of Walker's claim is that since Food Machinery obtained its patent by fraud *it cannot enjoy the limited exception to the prohibitions of section 2 of the Sherman Act, but must answer under that section and section 4 of the Clayton Act in treble damages to those injured by any monopolistic action taken under the fraudulent patent claim.*" (382 U.S. at 176; emphasis added.)

It is clear that, contrary to the characterization in Petitioner's Brief at p. 57, it was the enforcement of the patent which violated the Sherman Act and not the fraud in its procurement.

This reasoning has been applied in a number of lower court opinions which have held agreemnts to use ajudicatory processes to restrain trade violative of the Sherman Act. In *Kobe, Inc. v. Dempsey, supra,* the plaintiffs joined together to bring a patent infringement action against the defendants. The defendants, by cross-complaint, al-

leged inter alia that the plaintiffs had conspired to restrain the defendants' trade; that the infringement action was instituted pursuant to this conspiracy; and that the infringement action was unjustified and brought in bad faith. After a trial, the court found that plaintiffs' conspiracy was a violation of the antitrust laws, awarded damages, and entered an injunction against the conspiracy. Plaintiffs appealed and the Court of Appeals affirmed. The plaintiffs in *Kobe* contended on appeal that they had believed there was a genuine infringement of their patents and that they had the right to use available legal forums in order to protect their interests. In response, the Court of Appeals stated:

> "[w]e fully recognize that free and unrestricted access to the courts should not be denied or imperiled in any manner. *At the same time we must not permit the courts to be a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition.*" (198 F.2d at 424; emphasis added.).
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> * * *
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> "We have no doubt that if there was nothing more than the bringing of the infringement action, resulting damages could not be recovered but that is not the case. The facts as hereinbefore detailed are sufficient to support a finding that although Kobe believed some of its patents were infringed, *the real purpose of the infringement action and the incidental activities of Kobe's representatives was to further the existing monopoly and to eliminate Dempsey as a competitor.* The infringement action and the related activities, of course, in themselves were not unlawful, and standing alone would not be sufficient to sustain a claim for damages which they may have caused. But when

considered with the entire monopolistic scheme which preceded them we think, as the trial court did, that they may be considered as having been done to give effect to the unlawful scheme." (198 F.2d at 425; emphasis added.)

The Court of Appeals expressly recognized the destructive effects of a ruling which would permit unrestricted access to the courts for anticompetitive purposes:

"To hold that there was no liability for damages caused by this conduct, though lawful in itself, would permit a monopolizer to smother every potential competitor with litigation before it had an opportunity to be otherwise caught in its tentacles and leave the competitor without a remedy." (198 F.2d at 425; emphasis added.)

In *United States v. Krasnov, supra,* the defendants were charged with conspiring to restrain trade and create a monopoly by excluding competitors from the defendants' patent pool and by harassing competitors with infringement suits. Similar to the present case, the defendants in *Krasnov* agreed to bring harassment suits upon the mutual consent of the members of the conspiracy and upon a sharing of the costs of the suits.

On the government's motion for a summary judgment the district court held that the defendants' activities violated section 1 of the Sherman Act. On the issue of the defendants' misuse of judicial processes, the court stated:

"[t]hat the harassing suits against competitors, previously discussed in some detail, were *designed as and were actually only harassing suits* is clear from an examination of the correspondence between the parties and the court feels that such conclusion is ines-

> capable from an objective analysis of the documents. All of these actions taken in concert constitute a clear violation of the Sherman Antitrust Act. . . ." (143 F.Supp. at 202; affirmed 355 U.S. 5 (1957).)

In *Lynch v. Magnavox Co., supra,* the plaintiff brought an antitrust action alleging a conspiracy to restrain trade and an attempt to monopolize. The district court sustained the defendants' demurrer to the complaint. The Court of Appeals reversed. The plaintiff had alleged that the method agreed upon by the defendants was to pool their patents in a conspiracy and then, " 'under the threat of patent litigation of all asserted rights of all of the parties to the pool and combination,' " to force competitors out of the market. (94 F.2d at 886.) More particularly, the defendants agreed to have one member of the conspiracy bring an action, followed by other members bringing the same or similar actions, to harass competitors with litigation until they were driven out of business. (Id.) Plaintiff alleged that the infringement suits were brought in bad faith and without probable cause or an honest belief that the patents held by defendants were valid. (Id at 887.) In response to this allegation, and in finding a good cause of action, the court stated:

> "We may assume that each of those acts would be lawful; and still a conspiracy might be shown. *If the agreement has an unlawful purpose, it is a conspiracy, notwithstanding that the means used to carry it out were lawful.*" (94 F.2d at 889; emphasis added.)

In stating that the plaintiffs brought a good cause of action, the court stressed that it was the conspiracy to restrain trade, not just the actions filed by the conspirators, which constituted the antitrust violation. If the actions

filed in court were filed without probable cause or in bad faith, these actions standing alone would, of course, be illegal as antitrust restraints and malicious prosecutions. If these actions were filed with probable cause and in good faith, they would still be illegal since they were filed as part of a conspiracy to restrain trade. In either case, the court made clear that it was the purpose of the conspiracy itself, not the individual acts taken pursuant to the conspiracy, which determined whether a violation of the antitrust laws existed. In the present case, plaintiffs have alleged that defendants instituted their proceedings for the purpose of restraining trade and monopolizing the industry. Irrespective of whether defendants had colorable ground for protesting plaintiff's applications or not, if such proceedings were brought pursuant to an illegal purpose, such activities are prohibited by the Sherman Act.

See also *Stewart-Warner Corp. v. Staley*, 42 F.Supp. 140 (W.D. Pa. 1941) (Allegations that parties joined in concerted action to threaten competitors with bad faith litigation states a good cause of action under the antitrust laws):

Clapper v. Original Tractor Cab Co., supra (Attorneys' fees should be included in antitrust damages awarded against defendants who conspired to misuse patents by bringing unfounded suits against competitors).

Slick Airways, Inc. v. American Airlines, Inc., supra, is remarkably similar to the case at bar in terms of the method used to restrain trade—the forms and procedures of litigation—although much smaller in scope and magnitude, involving only one certification proceeding. *Slick* was a treble-damage action charging the defendants with

conspiracy to restrain trade and monopolize the air freight industry through predatory rate policies, abuse of the privilege of intervention and participation in Civil Aeronautics Board certification proceedings, and a campaign of unfair competitive practices. Defendants moved to dismiss for lack of jurisdiction. The court denied the motion, reasoning that even if all of the conduct of the defendants, standing alone, were legal, if undertaken pursuant to a conspiracy to restrain trade such conduct would violate the Sherman Act.

> "While it may be questioned whether any of this alleged activity by defendants of itself constituted illegal conduct, it is fundamental, as previously noted, that legal means may be utilized to accomplish the unlawful objectives of conspiracy, *American Tobacco Co. v. U.S., supra,* 328 U.S. at page 809 . . ., and this court cannot deprive the plaintiff of its right to attempt to prove that these alleged acts were part of the total acts undertaken to effectuate the alleged conspiracy." (107 F.Supp. at 214)

To avoid the impact of the above cases the defendants have consistently argued that (1) patents are fundamentally different from certificates so that litigation involving patents is "private" while the same processes when applied to certificates are "political" and (2) in each of the patent cases, some activity other than litigation was present which constituted "cogent reasons for subordinating the First Amendment." (Petitioners' Brief p. 57.)

Access to courts has clearly been limited in order to protect the primary function and purpose of adjudicating procedures, which is to obtain decisions on the merits and not to restrain trade by their use. The patent cases cited

above would all have been decided in favor of the violator if the rule of law defendants argue for were embraced by the Court. We submit that the distinctions consequently asserted below by defendants between "private" and "public" litigation is no standard at all, much less a "bright line" sufficient to characterize certificate litigation as "public" and patent litigation as "private," hence protecting abusive use of processes in one and condemning it in the other.

Defendants attach significance to the fact that a certificate is revocable and that one may overlap another. Defendants fail to mention the certificates may also be bought and sold, or traded. On the other hand, as the argument continues, a patent is a property right, may be bought, sold or traded, and, once granted, exclusive and non-revocable. Defendants have argued below that public interest permeates certification proceedings rendering them "political" whereas patent proceedings are apparently devoid of public importance; that if the idea or device in a patent application meets the test of novelty and usefulness the granting of the patent is merely an automatic, ministerial act whereas the application of the public convenience and necessity test to a given petition for a certificate is so completely discretionary that it becomes a "political" judgment. Defendants failed to cite any authority for their assertion. Defendants ignore the fact that patents, although not revocable as such by a private action, may be cancelled or annulled by the government (*Mowry v. Whitney*, 81 U.S. (14 Wall.) 434 (1872)); may be held invalid after their grant; may be held unenforceable; may be subject to compulsory licensing after letters have is-

sued; and may be cancelled for abusive use. Patents are also subject to numerous antitrust restrictions upon their aggregation in pools and the manner in which they may be licensed. The courts have fashioned rules regulating patents which go far beyond the bare statutory language and constitutional provisions. The courts have exercised wide, and indeed effective, discretion in making such rules. Yet to say that litigation respecting patents is "political" activity is just as ridiculous as the same statement respecting certificates.

Certificated carriers are no less subject to the antitrust laws than patent holders. Both patents and certificates are forms of legal monopoly granted to private persons by the government. Both are subject to protection—and abuse—through litigation. The system of patents results from constitutional and statutory provisions rooted in a strong public policy which encourages invention.

> " 'A patent by its very nature is affected with a public interest . . . [It] is an exception to the general rule against monopolies and to the right to access to a free and open market. *The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds* free from fraud and other inequitable conduct and that such monopolies are kept within their legitimate scope.' " *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. at 177.

Defendants' description of factors considered in finding public convenience and necessity might very well have been copied from *Walker Process* in its description of the

public interest involved in the patent field. (Petitioners' Brief, pp. 16, 30 and 41.)

The involvement of public concern and discretion in private litigation does not convert such litigation into political expression. A combination of certificate holders, just as a combination of patent holders, which uses its combined economic power to strangle its competition through oppressive litigation must be condemned by the antitrust laws.

Defendants also argue that it is the quantity of discretion which a judicial body exercises in resolving a dispute which determines whether the resolution is political or private in nature. But that too is a bare assertion unsupported by analogy or authority. If discretion were the test, all antitrust litigation would be "political" and hence *Noerr* protected, for nowhere has Congress delegated greater discretion than it has in delegating to the courts the responsibility for resolving private disputes under the Sherman Act. Antitrust suits, certificate proceedings and patent litigation, like all other adjudication of private interests, have some effect on public policy. Yet, to recognize this fact does not transform private disputes into political activities.

The second point of distinction made by defendants is that several means, rather than solely litigation, were used in the patent cases to restrain trade. It is not valid to distinguish those cases from *Noerr* or *Pennington* on that basis. Such conclusion necessarily requires that the government related activity in both types of cases be considered similar in their exempt status and the cases distinguished only on the fact that other activity was present.

In *Pennington* there were multiple means used including government activity to restrain trade. In *Singer* there were multiple means used to restrain trade. However, the cases were treated differently by this Court. In *Pennington* the means which involved government were completely split off by the Court from other restraints and given an exempt status whether standing alone or as part of a larger plan. In *Singer* the means involving government were not split off but considered part of the whole restraint. The reason for the different treatment, we submit, is obviously because the Court considered the government related activity in *Pennington* to be critically different from the government related activity in *Singer*; not because *Singer* involved multiple means one of which was the use of government.

Further proof of the point is found by comparing *Noerr* and *Walker*, where only one means, government related activity, was used to restrain trade. This Court treated them differently. The reason for the difference was not that one or more than one means was used but that the nature of the government related activity involved was critically different. *Noerr* involved the legislative and executive branches, *Walker* the judicial.

C. Defendants' activities are dissimilar to defendants in Button and the union cases[14]

Defendants' activities are dissimilar to defendants in *Button* and the union cases as well as *Noerr* and *Penning-*

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[14] *NAACP v. Button*, 371 U.S. 415 (1963).
United Transportation Union v. State Bar of Michigan, ... U.S. ....., 28 L.Ed.2d 339 (1971).
United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967).
Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964).

ton. The critical differences are that in *Button* and the union cases (1) the aims of the defendants were lawful, (2) the processes of the courts were not being used in an "offensive, malicious or avaricious manner" (371 U.S. at 443), (3) in *Button* it was recognized that litigation may well have been the only practicable means open to the defendants to petition government for the vindication of civil rights, thus (4) the NAACP was engaged in political activity. The presence of these factors entitled defendants in *Button* and the union cases to constitutional protection. None of these factors is present in the case at bar. These cases will be discussed more fully in the First Amendment arguments (infra p. 81). They are mentioned here because the conduct in those cases is essentially dissimilar from that of defendants in the instant case.

D. The Function of Granting Certificates, Transfers and Registration (after 1963) is Adjudicative

Adjudication is the application of a legal standard of greater or lesser generality to the facts of a specific case.

Defendants while admitting that the form of granting licenses is adjudicative in nature, argue that in basic essence it is "legislative" and because of the broad standard involved the determinations are tantamount to the "public interest." (Petitioners' Brief pp. 32-33.)

Their motive in singling out certificate proceedings for this special treatment is manifest. Their reasoning is that if the Court is convinced that certificate proceedings before agencies and courts occupy this unique position it follows they may use the adjudicatory process to restrain trade because by making such protests in certificate

proceedings they are engaged in "political expression." The Interstate Commerce Commission, in the exercise of its licensing functions, is engaged in adjudication. (See Statutes and Rules set forth in Appendix to Petitioners' Brief, pp. iii through xix, and Appendix to this Brief, pp. i to lxix.) The same is true of California Public Utilities licensing procedures. (See Statutes and Rules set forth in Appendix to Petitioners' Brief, pp. xix to xxvii, and Appendix to this Brief, pp. lxx to lxxxvii.)

The California Public Utilities Commission is established as a court of record by the state constitution. Cal. Constitution, Art. XII, §§22, 23. The Supreme Court of California in *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640, 137 P. 1119 (1913), soon after the establishment of the Commission, ruled that it exercised judicial functions, as well as purely legislative or legislative-administrative functions. The Court stated:

> ". . . it is proper to say that *we hold the powers and functions of the Railroad Commission in many instances, and in the present one, to be of a highly judicial nature.* That judicial powers were with deliberation vested in the Commission the language of the constitution and of the legislative enactments following the constitution leave no doubt. Thus the constitution itself declares: 'The Commission shall have the further power . . . *to hear and determine complaints* against railroad and other transportation companies; to *issue subpoenas and all necessary process* and send for persons and papers; and the commission and each of the commissioners shall have the power to *administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record.*' (Sec. 22, art. XII.) While with-

out quoting, a reading of sections 22 and 23 of article XII of the constitution and of sections 53 to 81 of the Public Utilities Act *will establish beyond doubt that the Railroad Commission is empowered to sit, and in the performance of its most important duties must sit, as a tribunal exercising judicial functions of great moment.* It may be said that the final order of the commission in many instances is legislative-administrative in character, but nonetheless the *ordained procedure by which this result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon these controverted matters, are strictly judicial. (Robinson v. Sacramento,* 16 Cal. 208; *Imperial Water Co. v. Board of Supervisors,* 162 Cal. 14 [120 Pac. 780]).'' (Emphasis added.)

More recently, in *People v. Western Air Lines, Inc.,* 42 Cal. 2d 621, 268 P.2d 723, *appeal dismissed,* 348 U.S. 859 (1954), the Court was confronted with the question whether the decision of the PUC in a prior proceeding constituted a predicate for the application of collateral estoppel in a subsequent criminal proceeding. The argument of the defendant was that since the PUC was merely an administrative tribunal and not a court its decisions were insufficient for res judicata purposes.

The Court rejected this argument and reaffirmed the reasoning of the *Eshleman* case, *supra.*

''The defendant relies on the case of *Stratton v. Railroad Commission,* 186 Cal. 119, which contains declarations that appear to be contrary to other and later decisions of the courts on the subject. It was said in that case at page 126 that 'the commission is not

a judicial tribunal in the strict sense.' That statement is of course true. The commission is not a judicial tribunal constitutionally established as a part of the judicial department of the state.

. . . .

So, while it is true that the commission is not a judicial tribunal in a strict sense, it does not follow that it does not possess well established and well understood judicial power.

It was also said in the Stratton case that 'the commission is essentially an administrative and legislative tribunal, and not a court,' and the fact that the commission must make determinations of fact for its own guidance 'does not make it a court or change the character of its decrees from administrative or legislative orders into judicial judgments.' These and other statements in the opinion in that case are inconsistent with the decisions of this court both before and after it on the subject of the judicial power of the commission. Insofar as they are so inconsistent they are overruled.''

(42 Cal.2d at 631-32.)

The *Stratton* case, expressly overruled in *People v. Western Air Lines, Inc., supra,* was heavily relied upon by the Court in *Sale v. Railroad Commission,* 15 Cal.2d 612, 104 P.2d 38 (1940), (cited by defendants, Petitioners' Brief at 38-39) for its characterization of the PUC. The *Sale* case is further diminished in its vitality when it is recognized that the Court there failed to distinguish the various capacities, including judicial, in which the PUC acts, as clearly acknowledged, not only in *Western Airlines* and *Eshleman* but also in *Southern California Edison v. R.R.*

Commission, 6 C.2d 737, 748-749 (1936), a case cited by defendants.

The fact is that most regulatory agencies, including the PUC and the ICC, are a kind of fourth branch of government performing functions some of which are judicial in nature, some legislative in nature, and some even executive in nature. Regardless of the label applied, however, the commissions in the exercise of their certificating function act in a judicial capacity—they apply a legal standard to the facts of a specific case to resolve individual cases between private parties over private business rights. Judge Friendly, in his article entitled "The Federal Administrative Agencies: The Need for Better Definition of Standards," 75 Harv.L.Rev. 863 (1962) illustrates this distinction by comparing an agency's industry-wide rule-making role with its role in determining who should be granted a broadcast license, or by analogy, a certificate of public convenience and necessity.

> "Unlike the short sale rules, such [licensing] decisions involve not a prescription for the whole or even a segment of an industry but *the application of a standard to a concrete case requiring not only the determination of the standard but also the accurate ascertainment and proper weighing of scores of subsidiary facts* and, in the first example, the consideration of a vast complex of relationships. From a practical standpoint, therefore, it may be slightly misleading to characterize true administrative adjudication as 'delegation' by the legislature; a body cannot 'delegate' in any meaningful sense the performance of action it would be incapable of taking on its own even if it had the time and desire". (75 Harv.L.Rev. at 871; emphasis added.)

Judge Friendly explains this matter further:

> "It will scarcely have escaped your attention that the application of standards of greater or less generality to concrete cases is not a function peculiar to administrative agencies; it has long been practiced by other institutions not unknown to law students. Indeed, at one end of the administrative spectrum, *it is hard to discern much difference between either the problem or the decisional processes of the agencies and those of the courts.*" (75 Harv. L. Rev. at 874; emphasis added.)

Defendants contend that certification proceedings are adjudicatory in form only—emulating the procedures of courts while engaging in a legislative process. But, as this Court has recognized, it is precisely because the Commissions are adjudicating individual cases that the procedures of courts are respected. *Hanna v. Larche,* 363 U.S. 420 (1960); *Greene v. McElroy,* 360 U.S. 474 (1959); cf. *Jenkins v. McKeithen,* 395 U.S. 411 (1969). See also *Wisconsin v. Constantineau,* ..... U.S. ....., 27 L.Ed2d 515 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

In *Hanna, supra,* the issue was whether the line between investigation and adjudication had been crossed so as to require that the respondents be accorded the right to confront and cross-examine witnessess against them in hearings before the Civil Rights Commission. In holding that this line had not been reached, this Court distinguished the due process requirements for each type of proceeding.

> "Thus, *when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals,* it is imperative that

those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used." (363 U.S. at 442; emphasis added.)

The Court distinguished *Greene v. McElroy, supra,* a case involving the denial of a security clearance without an opportunity to confront and cross-examine persons who accused the petitioner of disloyalty, as follows:

"[f]inally, our decision last year in *Greene v. McElroy* lends little support to the respondents' position. *The governmental action there reviewed was certainly of a judicial nature.* The various Security Clearance Boards involved in *Greene* were not conducting an investigation; *they were determining whether Greene could have a security clearance—a license in a real sense, and one that had a significant impact upon his employment.* By contrast, the Civil Rights Commission does not make any binding orders or issue 'clearances' or 'licenses' having legal effect. Rather it investigates and reports leaving affirmative action, if there is to be any, to other governmental agencies where there must be action de novo." (363 U.S. 452 emphasis added.)

The similarity between *Greene* and the present case is obvious. Neither the applicant for a security clearance nor for a certificate has a "right" to obtain it. Both are granted only where the applicant qualifies under the prevailing standard. In both cases, the standard applied is very broad, "national security" in one, "public conveni-

ence and necessity" in the other. In the application of either standard the decision-maker has broad discretion. Only the abuse of this discretion will cause the reversal of a decision in any given case. Both clearances and certificates are prerequisites to access to particular occupations—a license. The granting or denial of either will directly affect the applicant—and "have a significant impact on his employment." Both fundamentally involve the public interest. The process for obtaining either is adjudicatory, *not* just in procedure but in substance.

1. Adjudication is the Application of a Legal Standard to a Concrete Case. The Breadth of the Standard and the Existence of Sound Discretion in its Application Does Not Alter the Character of the Process

That the standard "public convenience and necessity" does not "connote an absolute" (Petitioners' Brief at 30) is completely true and yet totally misleading. While the determination in any given case is not automatic, the accumulation of experience, expertise and precedents gives these terms substantial meaning and permits an applicant to predict, with greater or lesser certainty, the probable disposition of his application. This fact was recognized by the Court in *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 65 (1945):

> "Public convenience and necessity is not defined by the statute [Interstate Commerce Act]. The nouns in the phrase possess connotations which have evolved from the half-century experience of government in the regulation of transportation. When Congress in 1935 amended the Interstate Commerce Act by adding the Motor Carrier Act, it chose the same words to state the condition for new motor lines which had been

> employed for similar purposes for railroads in the same act since the Transportation Act of 1920 . . . Such use indicated a continuation of the administrative and judicial interpretation of the language . . ."

In 1948, the California Public Utilities Commission promulgated a liberal interpretation of public convenience and necessity which focused on the qualifications of the applicant and dictated the granting of certificates unless the applicant was unqualified or the entry of a new competitor would threaten the economic stability of the industry. *Investigation of Carriers of Property,* 48 Cal. PUC 62 (1948), supplemented by 48 Cal. PUC 587 (1949). The motivation for the policy was to bring carriers operating under non-common carrier permits within the ambit of more effective regulation. Entry into the field was to be liberalized so that the Commisson could regulate service, safety and rates. *Re Staple Truck Lines,* 52 Cal. PUC 352, 353 (1953). The Commission, in *Investigation of Regulation of Carriers of Property,* 53 Cal. PUC 366 (1954), merely restricted the right of applicants to use evidence of prior, unlawful service to demonstrate the existence of demand for the service proposed. Future applicants would still be required to show they possessed satisfactory financial resources, facilities, personnel, equipment and experience to provide and maintain a highway common carrier service.

The rationale behind the policy of competition was well stated in *Re Hills Transportation Co.,* 58 Cal. PUC 785 at 788-89 (1961):

> "Transportation does not flourish best as a regulated monopoly. Historically, it always has been a highly

> competitive undertaking . . . The pattern of transportation regulation has been 'regulated competition' . . . Competition, to the extent it does not impair the economic stability of the transportation industry, is desirable in the field of highway common carriage."

The policy applied to applications for extension of operating authority is equally liberal, *Re M and M Transfer Co.*, 67 Cal. PUC 238 (1967). The PUC policy with respect to the transfer of certificates is even more lenient, requiring only that the transfer not be "adverse to the public interest"; *Re Todd Freight Lines, Inc.*, 63 Cal. PUC 723 (1964); *Re Frank Nolan Drayage Co.*, 61 Cal. PUC 160 (1963).

Granting that no member of the regulated industry has a right to the continuation of a liberal policy and that the commissions have the power, and indeed the duty, to modify their policy in the face of fundamental changes does not affect this case. The complaint alleges that this policy did *not* change—that it continued to and through the date of filing. The only right that an applicant has is to have his application judged by the policy then in force, whether it is "liberal" or "restrictive." The Ninth Circuit recognized *this* right. The defendants acted to defeat it, by making access to the commission inordinately burdensome, not to change the prevailing policy.

That the standard "public convenience and necessity" is general does not render its application a legislative function. Quite to the contrary, the application of such broad standards are common in the adjudicatory experience: "Due Process", "fair, just and equitable", "may be to substantially lessen competition, or to tend to create a

monopoly" (§7 of the Clayton Act, 15 U.S.C. §18), "unreasonable restraint of trade". This Court has recognized the fundamentally judicial nature of such standards. In *United States v. First City National Bank,* 386 U.S. 361 (1967) the Court was faced with a challenge to its ability to apply "the convenience and needs of the community to be served" test to a bank merger approved by the Comptroller of the Currency pursuant to the Bank Merger Act of 1966 (12 U.S.C. §1828(c)). The Court had no difficulty with the challenge, finding the test essentially judicial in nature.

> "This conclusion does not raise serious constitutional questions by making the courts perform nonjudicial tasks. The 'rule of reason', long prevalent in the antitrust field . . . has been administered by the courts. A determination of the effect on competition within §7 of the Clayton Act is a familiar judicial task . . . If the anti-competitive effect is adverse, then it is to be excused only if 'the convenience and needs of the community to be served' *clearly* outweigh it. We see no problems in bringing these standards into the area of judicial competence. There are no constitutional problems here not present in the 'rule of reason' cases." (386 U.S. at 369-70, emphasis in the original.)

The existence of discretion in the application of a legal standard to a particular case is also commonplace in the adjudicatory experience. For example, decisions on petitions for injunctions by a court of equity, the grant or denial of motions to amend pleadings, to dismiss a complaint, for summary judgment, etc. are within the sound discretion of the Court. The discretion of the commis-

sions in granting or denying applications for certificates is also limited to "sound discretion". As this Court said in *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88 (1957):

> "Of course, the Commission possesses a 'wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service . . . But that discretion must be exercised in conformity with the declared policies of the Congress. [e.g. the National Transportation Policy] To see whether those policies have been implemented we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made. Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress."

Again, in *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962), this Court declared that

> "[t]he Commission must exercise its discretion under §207(a) within the bounds expressed by the standard of 'public convenience and necessity' . . . And for the courts to determine whether the agency *has* done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it' *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 . . . The agency must make findings that support its decision, and those findings must be supported by substantial evidence." (371 U.S. at 167-68; emphasis in the original.)

The cases cited by the defendants on the issue of discretion show nothing more than that the commissions are the triers of fact in the first instance and that judicial review of their decisions is limited by the "substantial evidence" rule. The PUC and the ICC apply their expertise to the evidence submitted by the parties in a certification proceeding and then determine whether the proposed service is consistent with the public convenience and necessity as defined by earlier decisions and present conditions in the transportation industry. Judicial review of this determination is limited. If the decision is supported by findings of fact and the findings by substantial evidence the commission's action will be sustained. The reviewing court will not sift and weigh the evidence de novo. The same is true of facts found by juries in traditional trial courts. This does not transform either the commissions or juries into legislative bodies.

E. Application of the Sherman Act Will Not Impair the Flow of Information to the Commissions and Courts

Defendants argue that, by limiting the application of *Noerr-Pennington* to "public officials" who serve in a representative capacity, the Ninth Circuit has thereby made the Sherman Act applicable to all combinations which use the adjudicatory functions of government. This is clearly a distorted view of the Ninth Circuit opinion. Access to adjudicatory bodies is protected from the Sherman Act and other restrictive laws where it is used in a procedurally and substantively proper manner, without abuse and in an "atmosphere consistent with effective performance of" its functions. (Jt. App. 52 n. 6.) The Ninth Circuit clearly stated the values to be protected

in adjudicatory proceedings. Under its opinion, access to these bodies is free and unrestricted so long as it is not used for unlawful purposes. The opinion calls attention to the differences between information relevant to the proper functioning of an adjudicatory forum and that relevant to the proper functioning of political forums, as well as the differences in channels and means through which information is provided by citizens and received by government in the two contexts. This Court in *Noerr* did not deal with the values to be protected in adjudicatory proceedings because that issue was not before the Court as it was in *Singer* and *Walker Process.* Defendants' position that the rules of rough and tumble politics should be applicable in adjudicatory proceedings is totally without merit. The Ninth Circuit opinion merely dictates that adjudicatory processes may not be used by a combination to restrain trade. It, in effect, holds that opportunities for furnishing information in a legitimate manner exist and must be used. The Ninth Circuit merely denied defendants a license to engage in destructive, anticompetitive use of indiscriminate protests under the pretense that needed information could not otherwise reach government.

Defendants have argued their case as if there were no underlying agreement among defendants to use blanket protests to foreclose competitors' access, thereby drying up a valuable source of information. They argue as if each protest filed was a well considered attempt on their part to provide information. The Ninth Circuit recognized the error of this argument by correctly accepting, as true, the allegations of the complaint, that defendants'

plan was to prevent all information from reaching the agencies and courts.

Regardless of what defendants say, a finder of fact could justifiably conclude, from the details of the defendants' plan to protest each and every application, that they sought to prevent the functioning of the process by which information reached the commissions and courts.

Defendants argue that as "trustees of the public interest", they not only have the right but the duty to protest. Whatever the merits of that statement generally, and we seriously question it has any merit, it surely cannot apply to this case. For it is a travesty to say that "trustees" who deliberately plan a program of litigation calculated to deter competitors engaged in the same business, may with impunity foreclose those competitors from supplying and the agencies from receiving information by clogging and obstructing the flow of information. Defendants' argument comes down to this: because some information is incidentally provided by their protests, any group having information must be permitted to present it and the government must receive it even though the group's sole purpose is to frustrate, for anticompetitive ends, the effective functioning of the process in which the information provided is relevant.

Defendants make this argument in a context where many other avenues of communication, which would be within the protection of *Noerr,* were open to them. Defendants could have lobbied the legislature or the commissions in rule and policy-making proceedings; they could have participated in certification proceedings either by filing joint *amici* briefs or test cases. All of these

methods would have permitted defendants to make their position known to the commissions without imposing unreasonable burdens on the commissions or applicants. But, the purpose of defendants' activities was not to communicate information or induce a change in policy, but to deter the filing of applications. Only relentless, implacable opposition would produce the desired result.

Defendants contends that the allegations in the complaint that defendants protested each and every application "with or without probable cause, and regardless of the merits" (Jt. App. 7) mean only that

> "defendants did not try to make their own private determinations of whether public convenience and necessity justified the certificating in question; on the contrary, they consistently volunteered whatever evidence and opinion in opposition to additional certification they could produce, leaving to the agency the ultimate determination." (Petitioners' Brief p. 47.)

Defendants are too generous. What these allegations mean is that even if defendants knew to a certainty that the public convenience and necessity imperatively demanded the granting of an application and that their protest was completely groundless, they would protest—at the commission level and through every appellate level available to them. It was attrition—not agency action—which they sought.

Not only did the defendants have alternative means for communicating with the commissions, these agencies also have alternative sources of information. Regulatory agencies develop substantial bodies of expertise regarding their regulated industry. They also maintain staffs

of transportation experts and investigators in daily contact with the industry. In addition to day-to-day monitoring, the commissions have the authority to initiate industrywide rule-making or investigatory proceedings to examine, in detail, any facet of the industry. Information supplied by applicants for certificates must be verified. In view of the expertise of the agencies, they are not completely dependent upon the parties in any given proceeding.

For all the reasons stated above in this section, restrictions on the right of defendants to overload the channels of information by blanket protests are justified and will not impair communication between the industry and the commissions. The effect of applying the Sherman Act to defendants' conspiracy will be to reopen the certification procedures to the industry and to revitalize the flow of information to the commissions and courts.

III. THE CONDUCT OF THE DEFENDANTS IS NOT PROTECTED BY THE FIRST AMENDMENT

Recognizing the pre-eminent position the First Amendment justifiably has in our constitutional system, plaintiffs respectfully submit that it has no application in this case. The holding of *Noerr* rested upon a construction of the Sherman Act—not on the First Amendment.[15]

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[15]Footnote 6 of the *Noerr* decision makes this clear:
"The answer to the truckers' complaint also interposed a number of other defenses, including the contention that the activities complained of were constitutionally protected under the First Amendment. . . . Because of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider any of these other defenses." (365 U.S. at 132.)

It is clear, however, that had the Court found the defendants' activities to be within the reach of the Sherman Act, the constitutional issue would have been dealt with. As demonstrated above, neither of the other reasons for the *Noerr* decision, "essential dissimilarity" nor "substantial impairment" of representative government officials' ability to represent their constituents' wishes, is applicable to this case. Therefore, we discuss the constitutional issue.

The First Amendment does not protect the activities of defendants for two reasons. First, the right to petition is not an absolute right. The scope and limitations of that right are different in adjudicatory bodies[16] than in the legislative and executive branches of government. Second, the right is available only to parties who genuinely seek to influence governmental action. Defendants do not occupy either of the protected positions.

The First Amendment provides that:

> "Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

These rights are cognate and inseparable, *Thomas v. Collins,* 323 U.S. 516 (1945), but they are not absolute, and the degree of protection varies depending upon the context in which they are exercised. They are limited

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[16]See *Melvin v. Pence,* 130 F.2d 423 (D.C. Cir. 1942) where access to administrative adjudicative proceedings was limited where a protestant misused the processes of the agency. The Court held there was no difference between limitations on use of judicial proceedings in agencies and in courts. (130 F.2d 426-427.) See also *National Surety Co. v. Page,* 58 F.2d 145 (4th Cir. 1932).

and correlative and reasonable restrictions upon their exercise are permissible. *Citizens Publishing Co. v. United States,* 394 U.S. 131 (1969); *Adderley v. Florida,* 385 U.S. 39 (1966); *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490 (1949); *Associated Press v. United States,* 326 U.S. 1 (1945). One cannot exercise his First Amendment rights so as to deprive others of theirs. In *Citizens Publishing Co. v. United States,* supra, this Court, in response to arguments that the defendant newspapers' combination in restraint of trade was immunized from the Sherman Act by the First Amendment, stated:

> "[t]he restraints imposed by these private arrangements have no support from the First Amendment as Associated Press v. United States, 326 U.S. 1, . . . teaches. . . . As we stated in the Associated Press case:
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> 'It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests . . .' 326 U.S. at 20. . . ." (394 U.S. at 139.)

Similar limitations were imposed on the guaranty of freedom of speech in *Giboney v. Empire Storage & Ice Co., supra.* In *Giboney,* an ice peddlers' union attempted to induce ice wholesalers to refuse to deal with non-union peddlers. Such an agreement was violative of a state statute prohibiting combinations in restraint of trade. When Empire refused to submit to the union's demands the union resorted to peaceful picketing. Empire obtained an injunction against the picketing and the union appealed on the ground that the injunction infringed upon its right to freedom of speech. The Court unanimously rejected this contention:

> "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now." 336 U.S. at 498.
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> "It is true that the agreements and course of conduct here were in most instances brought about through speaking or writing. But it has never been deemed an abridgment of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed. . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." 336 U.S. at 502.
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> * * *
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> "Appellants' power with that of their allies was irresistible. And it is clear that appellants were

> doing more than exercising a right of free speech or press . . . They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade." 336 U.S. at 503.

The First Amendment rights of assembly and petition deserve no greater protection than the rights of speech and press. See *Adderley v. Florida,* 385 U.S. 39 (1966). That the right to petition extends to the judicial branch of government is clear. *United Transportation Union v. State Bar of Michigan,* ..... U.S. ....., 28 L.Ed.2d 339 (1971); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1 (1964); *NAACP v. Button,* 371 U.S. 415 (1963). However, where a petition is addressed to adjudicatory bodies, the petitioner's purpose and intent are pivotal factors in determining whether the petition is protected or not. The right to petition courts, like the rights of speech and of the press, must give way when private persons make wrongful efforts to corrupt or subvert judicial action. *Cox v. Louisiana,* 379 U.S. 559 (1965). *Shelley v. Kraemer,* 334 U.S. 1, at 22 (1948); *Pennekamp v. Florida,* 328 U.S. 331 (1946); *Bridges v. California,* 314 U.S. 252 (1941). In *Sheppard v. Maxwell,* 384 U.S. 332 (1966), this Court held that the constitutional right of free speech could not be used to subvert the judicial process or obstruct its administration:

> "[b]ut, the Court has also pointed out that 'legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.'

Bridges v. California, supra, 314 U.S. at 271, 86 L.Ed. at 207, 159 ALR 1346.

* * *

"'Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.' *Pennekamp v. Florida*, 328 U.S. 331, 347. . . . But, it must not be allowed to divert the trial from the 'very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures'." (384 U.S. at 350-51.)

See also, *Illinois v. Allen*, 397 U.S. 337 (1970); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

Defendants contend that their activities are protected from Sherman Act liability by *NAACP v. Button*, 371 U.S. 415 (1963). Their reliance on *Button* is misplaced. *Button* involved the application of Virginia's recently amended barratry statute to a program conducted by the NAACP, as part of its campaign to eradicate racial segregation in public schools, wherein the NAACP solicited potential plaintiffs, both members and non-members, and urged them to retain the NAACP legal staff to represent them in the vindication of their constitutional rights. The NAACP was to bear all litigation expenses. The highest state court held that the NAACP's activities constituted improper solicitation of legal business. This Court interpreted that decree "as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys." 371 U.S. at 433. As so construed the statute trenched upon the First and Fourteenth Amendments because it unduly

inhibited "protected freedoms of speech and association". Id. at 437.

Four reasons were present in *Button* which justified holding that the activities of the NAACP were protected. First, the association seeking to use judicial processes did so for what were clearly found to be means of *political* expression.[17] Second, litigation, of the type sponsored by the NAACP, was the sole practicable avenue open to the Negro minority to petition for redress of grievances. 371 U.S. at 430. Third, the NAACP, in advocating litigation, acted with lawful intent and purpose and to achieve a legitimate objective, the vindication of the constitutional rights of a minority to equal protection of the law and to end to unlawful racial segregation in public schools. Fourth, resort to the courts by the NAACP was not to use the process oppressively or avariciously for purely private gain. The Court distinguished such a lawful objective from those types of solicitation traditionally condemned as follows:

> "[m]alicious intent was of the essence of the common law offenses of fomenting or stirring up litigation. And whatever may be or may have been true of suits against government in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through

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[17]"In the context of NAACP objectives, litigation is not a technique for resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today." (371 U.S. at 429-30, footnotes omitted.)

> litigation, as a matter of law, cannot be deemed malicious. Even more modern, subtler regulations of unprofessional conduct or interference with professional relations, not involving malice, would not touch the activities at bar; regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest. Hostility still exists to stirring up private litigation where it promotes the use of legal machinery to oppress: As, for example, to sow discord in a family; to expose infirmities in land titles, as by hunting up claims of adverse possession; to harass large companies through a multiplicity of small claims; or to oppress debtors as by seeking out unsatisfied judgments. For a member of the bar to participate, directly, or through intermediaries, in such misuses of the legal process is conduct traditionally condemned as injurious to the public." (371 U.S. at 439-41; all footnotes omitted.)

The Court concluded that:

> "[r]esort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain." 371 U.S. at 433.

Each of the three cases following *Button* on the issue of association for litigational purposes, *United Transportation Union v. Michigan*, ... U.S. ....., 28 L.Ed.2d 339, 91 S.Ct. ..... (1971); *United Mine Workers v. Illinois State Bar Assoc.*, 389 U.S. 217 (1967) and *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), involved the extent to which the unions could assist their members in asserting their rights under federal and

state workmen's compensation statutes. While this Court extended the reasoning of *Button* to solicitation of litigation which was not directed at political objectives (389 U.S. 217, 223) it consistently emphasized the lawful purposes and objectives of the unions in each case.

The present case is totally different. Defendants claim that their activity was *political* and, therefore, within the protection of *Button*. The reasoning behind this contention is that (1) defendants sought to influence governmental determinations in certification proceedings; (2) no one has a "right" to certification; (3) the granting of certificates is based upon public convenience and necessity which necessarily equals "public interest"; (4) the public interest is a political concept; (5) therefore, defendants' activities were political. The defects of this syllogism are patent.

Premise No. 1 above is irrelevant to this case. The complaint alleges that the defendants merely used the forms of the judicial process and sought to clog the adjudicatory machinery to prevent it from functioning. As to premise No. 2, the "right"-"privilege" dichotomy has no constitutional significance. *Speiser v. Randall,* 357 U.S. 513 (1958). While no applicant has a "right" to have his application granted, every applicant has a "right" to have his application judged by the prevailing standard of law on the issue of public convenience and necessity. Defendants acted to frustrate this right and to prevent the commissions and courts from applying this standard.

Defendants' Third, Fourth and Fifth points are also without merit. Every rule of law is a manifestation of the

"public interest," a statutory or judicial compromise between conflicting policies, designed to contribute to the general welfare. In the commissions, as in the courts, when the balance between these conflicting policies shifts, a new rule of law reflecting this shift, is announced. Thus, all litigation, to one degree or another, involves and affects the public interest. This does not make litigation *political*. Litigation, whether it concerns certificates of public convenience and necessity, patents, workmen's compensation, personal injuries or property damages, is nonetheless litigation involving judicial processes between private parties. Litigation is conducted on a case or controversy method of resolving private disputes even where broad policy questions affecting others than the litigants are involved. If competitors choose the judicial or administrative adjudicative bodies to achieve anticompetitive purposes, then they must seek action through the rulings of such forums and not by use of their processes directly against competitors.

Defendants had numerous alternatives available to either change commission policy with respect to certification, in general, or to influence the determination in a given case without creating and perpetuating a plan designed to impinge upon the access of others to the bodies capable of granting business licenses. Such was not the case in either *Button* or the union cases.

In *Button* and the union cases, the NAACP and the unions acted for legitimate and lawful, indeed laudable, purposes. In the present case the defendants acted to restrain trade, to prevent the filing or prosecution of applications for certificates and to obstruct the machinery of

the commissions designed to control and direct the development of the transportation industry. Defendants seek to evade this critical distinction by characterizing the above purposes as "motivation" while contending that their "objective" was to persuade "the ICC, the PUC and the courts to draw certain conclusions in the public interest." (Petitioners' Brief p. 54.) This contention merely raises a fundamental question of fact calling for a trial on the merits for its resolution. The complaint alleges that the defendants acted to create a direct restraint upon competitors by deliberately initiating processes which worked directly on such competitors to deter and discourage access to the agencies which controlled the granting and extension of business rights. The success of this program depended on defendants' activity—not the determinations of the respective commissions or the courts. Defendants acted not to persuade the commissions but to dissuade their competitors. This is an unlawful objective and subjects the defendants to liability under the Sherman Act.

A. In Balancing Defendants' First Amendment Rights Against the Application of the Sherman Act to the Abusive Conduct of Defendants in the Employment of Procedural Machinery, The Sherman Act Should Apply

If defendants have any First Amendment right to use judicial and administrative adjudicatory procedures as a mechanism to restrain trade, the facts of the present case require that it be subordinated and the Sherman Act applied to defendants' conspiracy.

In striking the balance, the following factors should be weighed in favor of defendants' point of view: (a) the

First Amendment right to assemble and petition, (b) the right of citizens to inform government permitting it to function better when information is provided to it by interested citizens at no cost to government. The other side of the scale should be weighted as follows: (1) the right of the regulatory agency, subject to court review, to control market entry and expansion in accordance with its views of the desirability of competition, (2) the strong public interest in the enforcement of antitrust policy in the trucking industry where such industry is not exempt from Sherman Act application and where that policy does not irreconcilably collide with the regulatory scheme, (3) the value in preventing use of adjudicatory processes for purposes other than those for which they are designed, and thus maintaining their ability to resolve individual cases on the merits, and (4) the value in keeping adjudicatory bodies open and accessible, free from artificial obstructions to the flow of information.

The policies behind the antitrust laws of the United States were eloquently stated by Mr. Justice Black in *Northern Pacific R. Co. v. United States*, 366 U.S. 1, 4 (1958):

> "[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

To effectuate these policies the Sherman Act has been interpreted to reach all anticompetitive activities to the fullest extent permissible within constitutional limits. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *United States v. Frankfort Distillers, Inc.*, 324 U.S. 293 (1945), and to condemn all combinations which unreasonably restrain trade. *United States v. Line Material Co.*, 333 U.S. 287, 309-310 (1948). The defendants have created an unreasonable restraint of trade which violates the Sherman Act.

By deterring applicants from filing applications, the defendants took away from the commissions the opportunity to apply their prevailing transportation policy and thereby shape the growth of the trucking industry. Defendants also prevented much information, normally provided to the commissions by applicants, from being communicated to the commissions. The commissions and the public interest, as well as the plaintiffs, were injured by defendants' conspiracy. The interference by defendants with these important state interests weighs heavily in favor of application of the Sherman Act.

It is true, as defendants point out, that this case does not arise in a context of "free" competition. The pattern of transportation regulation has been "regulated competition." *In Re Santa Fe Transportation Co.*, 41 Cal. RC 239 (1938); *In Re Hills Transportation Co.*, 58 Cal. PUC 785, 788-89 (1961). As was said in the *Hills* case "Competition, to the extent that it does not impair the economic stability of the transportation industry, is desirable in the field of highway common carriage." The present case presents the issue: who is to decide which degree of competition is desirable—the defendants or the commis-

sions vested with this responsibility by Congress and the California legislature.

Judicial processes of the courts and commissions are designed to produce the just resolution of individual cases on their merits as expeditiously and economically as possible. Toward this end, the forums must presume that parties appearing before them participate in good faith with the aim of vindicating their point of view in the proceedings. This presumption is justified by human experience and required by sound administration. Where, however, parties initiate adversary proceedings, not for the purpose of prevailing on the merits but rather to use the judicial procedures, themselves, directly to injure their adversaries, an inexcusable burden is placed on the forum and the effective discharge of its mandate is prevented. Where a party or a combination of parties can so use the judicial process with impunity, respect for courts and administrative adjudicative bodies as impartial forums is impossible to maintain. As discussed below, the administrative agencies are incapable of controlling such a conspiracy on a case-by-case basis and, therefore, incapable of protecting themselves from such abuse. Where this abuse is designed to restrain trade and destroy competition, the Sherman Act is the appropriate sanction.

Accordingly, the proper test should be as follows:

> Where it can be shown that a group of competitiors combine and conspire to use, regardless of the merits of their case, the judicial *processes* and *procedures to* unreasonably restrain trade, rather than seeking such restraint through governmental action, a violation of the Sherman Act exists.

This test is applied in the Ninth Circuit opinion.

B. Application of the Sherman Act in This Case Cannot Create a Chilling Effect

Defendants contend that the Ninth Circuit's standard is too vague, ambiguous and uncertain. The result of such a test, according to defendants, is to create a "chilling effect" which renders the Sherman Act unconstitutional. The test, as do so many tests in the law, depends upon a finding of a requisite intent or state of mind. The existence vel non of this mental state will be shown by evidence. In *Singer* the Court confirmed this most elementary of legal concepts.

> "Whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used." (374 U.S. at 195).

Mere theoretical difficulty in "sorting out" in a businessman's "own mind" what is right or wrong cannot determine this case. In this case defendants are no more than "hard core" violators of the Sherman Act and should not be permitted to shelter themselves by asserting fancied difficulties a businessman acting in good faith might be confronted with. *Adderley v. Florida, supra,* cf. *Brown v. Louisiana,* 383 U.S. 131 (1966) (concurring opinion of Mr. Justice Brennan).

The proposed test is as definite and certain as the "actual malice" test enunciated by this Court in protecting the First Amendment rights of freedom of speech and of the press in the context of the common law torts of defamation and invasion of privacy. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Time, Inc. v. Hill,* 385 U.S. 374. The existence of this "actual malice"—conscious knowledge of falsity or reckless disregard of the truth

or falsity of a statement—is a question of fact to be determined by the jury upon proper instructions. *Time, Inc. v. Hill,* 383 U.S. at 393-394 n.11 and accompanying text. If supported by substantial evidence the jury's findings will be sustained on appeal. So also in the present case, if a jury should find, based upon substantial evidence, that defendants intended to use the procedures, rather than the determinations, of adjudicatory bodies to restrain trade, liability under the Sherman Act should result.

Furthermore, even if some restraint on defendants' freedom of action were to result this should not bar the application of the Sherman Act to the defendants' conspiracy. As Mr. Justice Black, speaking for the Court, stated in *Younger v. Harris,* 401 U.S. 37 (1971):

> "[m]oreover, the existence of a 'chilling effect', even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so." (401 U.S. 37, 27 L.Ed.2d 669, at 679-80).

As the following section will demonstrate, the PUC and ICC are incapable of protecting themselves from the type of abuse employed by the defendants. An independent action for such abuse is necessary and under the facts of this case, the Sherman Act is the proper source for that action.

IV. A CONSPIRACY SUCH AS THAT ALLEGED IN THIS CASE IS BEYOND THE COMPETENCY AND EXPERTISE OF THE ICC AND PUC

The arguments made by defendants regarding the "extensive regulatory supervision" of the PUC and ICC (Petioners' Brief at 67-72) are not properly before this Court. These are exclusive jurisdiction arguments which the lower courts expressly declined to decide. (See letter of Judge Sweigert to Michael N. Khourie dated October 25, 1967; Jt. App. at 44.) Plaintiffs will demonstrate that these arguments are false.

First, if defendants have a First Amendment right to utilize the procedures of administrative adjudication to restrain trade which protects them from liability under the Sherman Act, that right would similarly immunize them from and invalidate any rules or regulations promulgated by the commissions which would proscribe the use of procedures to restrain trade or to defeat the power of the commissions to regulate. Defendants lay great stress in their brief on the fact that commission rules on standing authorize their participation in certificate proceedings. But, if the defendants have a First Amendment right to use adjudicatory process in any manner and for any purpose they choose a commission rule which limited or denied defendants standing would infringe their alleged First Amendment right and, therefore be unconstitutional. The same alleged defects of vagueness and "chilling effect" would arise from a commission rule as defendants contend exist if the Sherman Act is applied to this case.

Second, assume that the PUC and ICC promulgate a rule which prohibits participation by combinations of competitors which intend to use the procedures surround-

ing the certification process as the method or means to restrain trade. To enforce such a rule the commissions would be required to hold a preliminary hearing in each certification proceeding, to examine in detail the motives and purposes of the combined certificate holders, their relationships to one another and to the applicant before the issue of standing could be determined. If standing to participate were denied this would constitute a final order by the commissions subject to judicial review in the courts. Only after the appellate review could the merits of the application be reached.

The results of such a hypothetical rule and its enforcement by the commissions are to divert the commissions from their area of special expertise, which is to determine the public convenience and necessity. Such a rule would require examination into complex and difficult questions of fact, intent, purpose, etc. more appropriate to traditional judicial forums. It would delay reaching the merits of the application and permit the defendants to accomplish their anticompetitive purposes.

Finally, no regulated industry is exempt from the Sherman Act by reason of the fact that it is regulated. This is true regardless of the pervasiveness of the regulatory scheme involved. Exemptions from the Sherman Act are created by Congress through express exemption or declared by this Court by reason of "repeal by implication" which is strongly disfavored and is only found in cases of plain repugnancy between antitrust law and the regulatory scheme. *United States v. Philadelphia National Bank,* 374 U.S. 321, 350 (1963) (Bank Merger Act of 1960, Comptroller of the Currency); *United States*

v. First City National Bank, 386 U.S. 361 (1967) (Bank Merger Act of 1966, Comptroller of the Currency); *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963) (Security Exchange Act of 1934 and Security Exchange Commission); *California v. Federal Power Commission,* 369 U.S. 482 (1962) (Natural Gas Act and FPC); *United States v. Radio Corporation of America,* 358 U.S. 334 (1959) (Federal Communication Commission); *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439 (1945) (ICC).

This Court has also declared that valid action by a state, *Parker v. Brown, supra,* or by the federal government, *U. S. v. Rock Royal Cooperative, supra,* is exempt. In *Noerr* and *Pennington,* this Court declared political activities genuinely seeking government action to be exempt. These exemptions and immunities do not exist by virtue of the "rule of reason" enunciated in *U.S. v. Standard Oil,* 221 U.S. 1 (1911), nor by the "existence of extensive regulatory supervision" as defendants argue (Petitioners' Brief pp. 67-72). The rule of reason protects from liability under the Sherman Act reasonable restraints of trade and has nothing to do with whether or not a business is regulated. The complaint alleges that defendants acted unreasonably. There is no reason to believe that the degree of regulation over them has somehow rendered their behavior reasonable. Despite this, defendants argue that this strange transformation has occurred. They cite not one shred of authority to support this proposition.

V. SUMMARY OF SELECTED LOWER COURT DECISIONS

From the following review of lower court opinions applying the *Noerr-Pennington* doctrine to diverse factual situations, it is apparent that the present case is essentially different from all prior cases in which the issue has been raised. In the present case the defendants are accused of using the forms of petition rather than its substance to restrain trade. Defendants attempted to influence governmental action only to the extent necessary to make the use of *procedures* an effective restraint.

In the cases summarized below, it is clear that the defendants genuinely and actively sought to induce governmental action which would injure their competitors. Many of the resulting restraints arose from the decisions of governmental agencies or officials. In the present case it was the joint activity of the defendants, not governmental action, which restrained trade and destroyed competition.

A. Cases Holding Noerr-Pennington Applicable

1. Association of Western Railroads v. Riss, 299 F.2d 133 (D.C. Cir. 1962):

The defendants, many of whom were also defendants in *Noerr*, were charged with conspiring to suppress competition through many of the same activities alleged in *Noerr*, none of which consisted of a conspiracy to restrain trade through the use of adjudicatory processes.[18] The only allegation which was even remotely similar to those

[18]The acts alleged were a public relations campaign directed at the plaintiff, lobbying and solicitation of state and city officials to enact laws, ordinances and regulations injurious to the plaintiff's interests, and similar activities. (See 170 F.Supp. 354, 357-358.)

in the present case was that the defendants' public relations campaign induced private citizens to register complaints against the plaintiff in ICC proceedings. The Court of Appeals noted that the *Noerr* case was decided four months after the district court opinion in *Riss*, and that the *Riss* district court had expressly relied upon the lower court opinions in *Noerr* for its jury instructions. Because so much of the *Riss* defendants' activities were directed at the enactment and enforcement of laws and, therefore, within the *Noerr* exemption, the jury instructions were erroneous and required reversal "irrespective of any other evidence in the present case." (299 F.2d at 135.) The court did not, contrary to the assertion made in Petitioners' Brief at p. 73, discuss the propriety of any particular conduct of the defendants in *Riss*. It merely held that since most of the evidence concerned activities within *Noerr* protection, the decision had to be reversed.

2. Baltimore & O. Ry. Co. v. New York, N.H. & H. Ry. Co., 196 F. Supp. 724 (S.D.N.Y. 1961):

In an action to recover money due under a freight car rental agreement, the defendant railroads counterclaimed alleging that the plaintiffs had violated the antitrust laws by (1) participating in an industrywide rate-making proceeding before the ICC, which culminated in ICC approval of rates higher than those defendants believed to be reasonable; and (2) by then bringing a declaratory judgment action against the defendants to have the approved rates declared "just, reasonable and otherwise lawful." (196 F. Supp. at 745.) At the end of a lengthy opinion in which the court had discussed a number of grounds indicating nonliability, there is a one-line reference to the

counterdefendants' propaganda efforts directed at the ICC and a Senate committee and the institution of court proceedings to enforce the rates. Without any discussion or analysis of the *Noerr* opinion, the district court implied that the two courses of conduct were indistinguishable under *Noerr*. With respect to the propagandizing activities, the court was correct—such activity is representative of the political activity *Noerr* sought to protect. With respect to the judicial activity alleged, the court was clearly wrong as the patent-antitrust cases indicate. The case is further distinguishable due to the absence of allegations that the counterdefendant railroads were using the judicial process to harass or directly restrain the counterclaimants. Any restraint would have been produced by the decision on the merits, not the mere use of the procedures of litigation. The counterdefendants were genuinely seeking to influence governmental action.

3. Schenley Industries, Inc., v. New Jersey Wine & Spirit Wholesalers Assoc., 272 F.Supp. 872 (D.N.J. 1967):

The plaintiff alleged that the defendants used improper influence on the state alcoholic beverage commission to induce favorable decisions and also that they lobbied for the passage of laws which prevented the plaintiff from entering the wholesale market. In both situations the defendants were lobbying legislative and executive bodies seeking to induce the passage and enforcement of laws. The genuineness of the defendants' efforts was conceded by the complaint. (See 272 F.Supp. at 884 n. 20.) Any resulting restraint was produced by governmental action coming within the *Parker v. Brown* "state action" exemption. There were no allegations that the adjudicative

process or proceedings were used by defendants to directly injure the plaintiff.

4. Bracken's Shopping Center, Inc. v. Ruwe, 273 F.Supp. 606 (S.D. Ill. 1967):

The defendants, downtown merchants, filed a representative suit in the state court challenging the validity of an ordinance under which the city of Peoria, Illinois had vacated several streets to permit the construction of the plaintiff's shopping center. If the defendants in the case at bar had sued the California PUC seeking a declaratory judgment invalidating its liberal certification policy, the *Bracken* case might support their claims of nonliability.

Bracken is further distinguishable on several grounds. First, only one suit, rather than an unlimited program of suits, was involved. Even under orthodox antitrust application, this would probably not be an unreasonable restraint of trade. Second, the suit was filed to induce governmental action invalidating the ordinance—the defendants sought a decision on the merits—rather than seeking to injure the plaintiff directly by using the *process* of litigation. Third, in *Bracken* the defendants were conclusively shown to have probable cause for bringing suit. (273 F.Supp. at 608.) The defendants in the case at bar are alleged to have protested where probable cause for such protests was totally absent.

5. A.B.T. Sightseeing Tours, Inc. v. Gray Line N.Y. Tours Corp., 242 F.Supp. 365 (S.D.N.Y 1965):

The complaint charged defendants with "lobbying activities with legislative bodies and administrative agencies of the City of New York to enact and promulgate

laws and regulations designed to suppress and eliminate competition between defendant and its competitors, including the plaintiffs." (242 F.Supp. at 369-370.) Finding the alleged activity indistinguishable from that in *Noerr* and *Pennington*, the court properly granted the motion to strike. There were no allegations that the defendant had attempted to eliminate competition through litigation of any kind, much less through a scheme of indiscriminate litigation.

6 **United States v. Johns-Manville Corp., 259 F.Supp. 440 (E.D.Pa. 1966):**

The defendants and co-conspirators were charged with anticompetitive lobbying directed at influencing state and local government units to adopt specifications for pipe which would injure their competitors. The activities were clearly within *Noerr* protection. Any adverse effects to competition would only occur after the specifications were adopted by government.

7. **Harman v. Valley National Bank of Arizona, 339 F.2d 564 (9th Cir. 1964):**

Combination to induce the state Attorney General to file suit against a savings and loan company forcing it into receivership. Since the suit was "state action" within *Parker v. Brown, supra*, Sherman Act liability could not be made to depend upon whether or not such state action was proper or lawful. No state action is challenged in the present case.

8. Central S&L Assoc. of Chariton, Iowa v. Federal Home Bank Board, 422 F.2d 504 (8th Cir. 1970):

Defendant, United Federal, applied to the Bank Board for authority to conduct business through mobile facilities in 12 communities. Authority was granted for three communities. Plaintiffs sued under the antitrust laws contending that the granting of such authority violated sections 1 and 2 of the Sherman Act. It is clear that *Parker v. Brown, supra,* covers this case, whatever the effect on competition if was a direct result of state action by the Bank Board. It is equally clear that the defendant was genuinely and honestly seeking to induce governmental action.

B. Cases holding Noerr-Pennington inapplicable.

1. Woods Exploration & Producing Co. Inc. v. Aluminum Company of America, 438 F.2d 1286 (5th Cir. 1971), petition for cert. filed, 39 U.S. L.W. 3528 (U.S. May 15, 1971) (No. 70-173, O.T. 1971):

Defendants were alleged to have filed false production forecasts (nominations) with the Railroad Commission in order to reduce the production quotas allowable to the plaintiffs, thereby curtailing production. It is clear that the defendants intended the Commission to rely on their false forecasts and that the Commission did so. However, the Circuit Court reasoned that the Commission relied implicitly on the truthfulness of the forecasts and made no independent judgment in reaching production allowables. Therefore, no state action within *Parker v. Brown, supra,* was present. It was defendants' conduct, not that of the Commission which injured the plaintiffs. In holding that the mere involvement of government should not serve to immunize predatory conduct the Court stated:

"[*t*]*he policies of the Sherman Act should not be sacrificed simply because defendants employ governmental processes to accomplish anti-competitive purposes.* Otherwise, with governmental activities abounding about us, government could engineer many to antitrust havens. We think that the doctrine should not be extended unless the factors upon which *Noerr* rested are present and require the same result. In Trucking Unlimited v. California Motor Transport Co., 9 Cir. 1970, 432 F.2d 755, the Ninth Circuit refused to immunize under *Noerr* a scheme whereby trucking companies conspired to oppose before state and federal regulatory commissions all applications by competitors for the issuance, transfer, or registration of operating rights. Characterizing the licensing procedure as adjudicative, the court felt that the defendants were not seeking to influence a policy-making function; rather they were attempting to undermine a well defined policy with regard to licensing operators by blocking and discouraging access to the governmental agencies. *Similarly, in the instant case,* there has been no attempt by defendants through the filing of false nominations to influence the policies of the Railroad Commission. The germination of the allowable formula was political in the *Noerr* sense, and thus participation in those rule-making proceedings would have been protected. But the formula's subsequent implementation is apolitical. Once the rule is promulgated, defendants may not plead immunity in their attempt to undermine its efficacy for anti-competitive purposes." (438 F.2d at 1296-97; emphasis added.)

2. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.) cert. denied, 400 U.S. 850 (1970):

Defendant was charged with having induced state and local purchasing agents to adopt swimming pool specifications which could only be filled by the defendant. The technique used to influence the governmental officials was a combination of intimidation, threats and harassment designed to undermine the state policy of competitive bidding. The Court held that even though the defendant genuinely sought to influence government its conduct was not of the type which *Noerr* or *Parker v. Brown* intended to protect. The indirect subversion of public policy should not be protected where direct means to change the policy are available.

> "The state legislatures, by enacting statutes requiring public bidding, have decreed that government purchases will be made according to strictly economic criteria. Paddock is free to seek legislative change in this basic policy, but until such change is secured, Paddock's dealings with officials who administer the bid statutes should be subject to the same limitations as its dealings with private consumers. Indeed, to hold otherwise might impair the effectiveness of competitive bidding." (424 F.2d at 33.)

Similarly in the case at bar, there was a fixed policy respecting the granting of certificates by the PUC. Defendants, rather than attempting to change it by *Noerr*-protected lobbying, undermined and subverted this policy through indiscriminate protests of all applications filed.

3. **Sacramento Coca Cola Bottling Co., Inc. v. Chauffeurs Local 150, 440 F.2d 1096 (9th Cir. 1971):**

Defendants were alleged to have combined and conspired to cause state fair officials to issue a directive forbidding the sale of Coca Cola upon the fairgrounds. The defendants used intimidation, threats and other coercive measures to influence the governmental officials. The Court held that *Noerr-Pennington* was not designed to protect such conduct.

4. **United States v. Otter Tail Power Co., 1971 Trade Cases ¶ 73,692 (D. Minn. 1971):**

In *Otter Tail,* the defendant private power company attempted to frustrate various plans of cities to develop municipal power systems which would compete with the defendant by means of a program of litigation. The suits attacked the validity of the municipal bond issues designed to raise revenue to finance the municipal systems. As the District Court noted:

> "A 'no-litigation certificate,' reflecting the absence of litigation which might impair the salability of revenue bonds, is essential to a successful sale of municipal bonds. The pendency of litigation has the effect of preventing the marketing of the necessary bonds thus preventing the establishment of a municipal system." (1971 Trade Cases at 90,891)

Thus, by the mere expedient of filing suit the defendant was able to at least delay and possibly defeat entirely the construction of competitive facilities. In the *Otter Tail* case as in the case at bar most of the litigation was carried to the highest available appellate level and filed

regardless of probable cause or the merits of the action. The defendant in *Otter Tail* was merely using the process of litigation to restrain trade:

> "the institution and maintenance of it had the effect of halting, or appreciably slowing, efforts for municipal ownership. The delay thus occasioned and the large financial burden imposed on the town's limited treasury dampened local enthusiasm for public ownership. In some instances, Otter Tail made offers to the towns to absorb the towns' costs and expenses, and enhance the quality of its service in exchange for a new franchise. Hankinson, after several years of abortive effort, accepted this type of offer and renewed defendant's franchise." (Id.)

Relying on the Ninth Circuit opinion in the case at bar the Court concluded that

> "the *Noerr* principle is applicable only to efforts aimed at influencing the legislative and executive branches of the government. It only immunizes political activity directed toward the enactment and enforcement of the laws from antitrust attack. See *Woods Exploration & Producing Co. v. Aluminum Co. of America* [1971 TRADE CASES ¶ 73,422], 438 F. 2d 1286 (5th Cir. 1971), and *Trucking Unlimited v. California Motor Transport Co., supra. Noerr* does not free from antitrust sanctions the institution of court litigation.
>
> From all of the evidence it appears that defendant, by refusing to deal with municipalities and by conducting or sponsoring court litigation, has violated Section 2 of the Sherman Act and monopolized or attempted to monopolize the sale of electric power in its service area." (Id. at 90,891-892.)

No other conclusion is possible if the adjudicatory function and process is to be preserved.

CONCLUSION

Licensing is becoming increasingly a prerequisite to the entry of business at all levels of government. Licensing procedures vary from the simplest ministerial act to complex hearings conducted in the judicial model. Opportunities are inherent through the mere persistent employment of such procedure for established and powerful businesses in strong market positions, either alone or in combination, to prevent or make market entry difficult for competitors. The capacity of businesses to developing new methods of finding ways to dispel competition is limited only by the imagination of their managers, which history has proved to be almost limitless. The Sherman Act and the strong policy of competition has been virtually the only effective brake.

Because licensing necessarily involves government and since the *Noerr-Pennington* and the *Parker v. Brown* doctrines have granted certain areas of immunity from the Sherman Act, it is not surprising to find increasing anticompetitive activity in those areas. It should not be surprising that these doctrines are being stretched to their limits and beyond. We believe that businesses which thus seek to find refuge for their predatory conduct in these doctrines employing plans which come as close to the line as possible must be held strictly accountable when they overstep it.

The combination in this case has exhibited an extremely low and rapacious level of business behavior. These defendants are the largest motor carriers, which when combined, possess monopoly power. Protest and hearing mechanisms provided by the government were calculatingly employed by them to control the market by intimidation, terrorization and extortion. Fraud upon government and bribery of government officials for anticompetitive purposes are intolerable as well as a violation of the Sherman Act. Such weapons however need not be used by the sophisticated and powerful. Persons, with the same anticompetitive motivation as the perjurer and briber, are in a position to make a pretense of using government legitimately. Rather than induce a government official to act upon false premises or beyond his scope, such persons have the means to actuate and employ an indispensible, honored and historic mechanism of government, the legal process. This means is convenient because it can easily and automatically be actuated by the filing of sworn papers. This automatic feature exists because in our government it is presumed that these processes will only be used in good faith and for their intended purposes.

We cannot of course argue for a finding of Sherman Act violation by alleging the low moral caliber of the behavior here, nor by calling attention to the fact that in their deliberate plan to abuse lawful processes they are no more than hard core law violators. Plaintiffs need not make that argument because defendants' deadly—and new—form of business predation clearly violates the Sherman Act.

Should this Court condone defendants behavior there will be repercussions of great magnitude not only in the field of regulated industries where large companies wield great power but in any business where government approval is necessary for market entry or where government disapproval may terminate a going business. Harassment through litigation will be protected under the banner of protecting constitutional freedoms and, the *straw-man* in this particular case, "the chilling" effect.

Plaintiffs sincerely feel that they will be able to prove every allegation in their complaint and that they are not overstating the adverse effects a ruling in favor of defendants will have. Plaintiffs therefore respectfully ask for affirmance of the Ninth Circuit's decision.

Respectfully submitted,

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Dated, October 26, 1971.

(Appendix Follows)

Appendix

Relevant provisions from the Interstate Commerce Act. Urgent Deficiencies Act, Administrative Procedures Act, General Rules of Practice (I.C.C.), California Constitution, California Public Utilities Code, Rules of Practice and Procedure (California P.U.C.)

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49 USC § 17. Commission procedure; delegation of duties; rehearings

Conduct of proceedings; seal; oaths; quorum; rules

(3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpoenas. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested. All hearings before the

Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest.

Findings, etc., of Commissioner or board; accompanying statement and recommended order; copies to parties; exceptions; recommended order as Commission's order

(5) Any finding, report, or requirement of an individual Commissioner or board, with respect to any matter so assigned or referred involving the taking of testimony at a public hearing, shall be accompanied by a statement in writing of the reasons therefore, together with a recommended order, which shall be filed with the Commission. Copies thereof shall be served upon interested parties (including, in proceedings under Chapter 8 of this title, persons specified in section 305(e) of this title), who may file exceptions thereto, but if within twenty days after service upon such persons, or within such further period as the Commission or a duly designated division thereof may authorize, no exceptions shall have been filed, such recommended order shall become the order of the Commission and become effective unless within such period the order shall have been stayed or postponed by the Commission or by a duly designated division thereof. The Commission, or a duly designated division thereof, upon its own motion may, and where exceptions are filed it shall, reconsider the matter either upon the same record or after further hearing, and such recommended order shall thereupon be stayed or postponed pending final determination thereof.

Rehearing, reargument, or reconsideration of decisions, orders, and requirements

(6) After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5) of this section, any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of a matter

assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2) of this section, if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5) of this section, and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

Reversal or modification after rehearing, etc.

(7) If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order or requirement made after rehearing, reargument, or reconsideration, reversing, changing or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order.

Stay of decisions, etc., not effective at time of application for rehearing, etc.

(8) Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the

rules and regulations of the Commission, and the decision, order or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission.

Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.

(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Reference of administrative matters to examiners

(10) Any matter arising in the administration of chapter 8 of this title as to which a hearing is to be held may be referred to an examiner of the Commission, for action thereon, subject to the conditions and limitations provided in this section in the case of reference of work,

business or functions, as to which a hearing is to be held, to an individual Commissioner or board.

Intervention of representatives of employees

(11) Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees.

Admission to practice before Commission

(12) The Commission is authorized to promulgate reasonable rules and regulations relating to admission to practice before it, and is authorized to impose a reasonable fee for such admission, and such fees shall be covered into the Treasury of the United States as miscellaneous receipts.

49 USC § 305. Administration—Joint boards; composition; references of matters to boards

(a) The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this chapter with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates, permits or licenses; the suspension, change, or revocation of such certificates, permits, or licenses; applications for the

approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts; . . .

Oaths; attendance of witnesses and production of documents

(d) So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter.

Notice of proceedings and opportunity for hearing

(e) In accordance with rules prescribed by the Commission, reasonable notice shall be afforded, in connection with any proceeding under this chapter, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor carrier operations involved in the proceeding are or are proposed to be conducted, and opportunity for intervention in any such proceeding for the purpose of making representations to the Commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties.

Court review of Commission's orders; compelling Commission to take jurisdiction

(g) Any final order made under this chpater shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title: *Provided*, That where the Commission, in respect of any matter arising under this chapter, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

Application of section 17 of this title

(h) All the provisions of section 17 of this title shall apply to all proceedings under this chapter.

Pecuniary interest in motor carrier under investigation forbidden

(i) No member or examiner of the Commission or member of a joint board shall hold any official relation to, or own any securities of, or be in any manner pecuniarily interested in, any motor carrier or in any carrier by raiload, water, or other form of transportation.

49 USC § 306. Certificate of convenience and necessity—Necessity for; carriers in bona fide operation on June 1, 1935; traffic moving to and from Territories and possesions; "grandfather" provisions

(a) (1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by

motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* . . .

Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful.

(6) . . . In accordance with such reasonable rules as may be prescribed by the Commission, any party in interest, who or which opposed in the State commission proceeding the authorization of operations in interstate or foreign commerce, may petition the Commission for reconsideration of the decision of the State commission authorizing operations in interstate or foreign commerce, and upon such reconsideration upon the record made before the State commission, the Commission may affirm, reverse, or modify the decision of the State commission, but only with respect to the authorization of operations in interstate and foreign commerce.

(7) (A) In the case of any person who or which on October 15, 1962, was in operation solely within a single State as a common carrier by motor vehicle in intrastate commerce (excluding persons controlled by, controlling, or under a common control with, a carrier engaged in operations outside such State), and who or which was

also lawfully engaged in such operations in interstate or foreign commerce under the certificate exemption provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before October 15, 1962, or who or which would have been so lawfully engaged in such operations but for the pendency of litigation to determine the validity of such person's intrastate operations to the extent such litigation is resolved in favor of such person, and has continued to so operate since October 15, 1962 (or if engaged in furnishing seasonal service only, was lawfully engaged in such operations in the year 1961 during the season ordinarily covered by its operations, and such operations have not been discontinued), except in either instance as to interruptions of service over which such person had no control, the Commission shall issue to such person a certificate of registration authorizing the continuance of such transportation in interstate and foreign commerce if application and proof of operations are submitted as provided in this subsection. . . Certificates of registration shall be valid only so long as the holder is a carrier engaged in operation solely within a single State, not controlled by, controlling, or under a common control with a carrier engaged in operation outside such State, and except as provided in section 5 of this title and in the conditions and limitations stated herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission, but may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign rights shall terminate the right to engage in interstate or foreign commerce.

Application for certificate; form and contents

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of subsection (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle on October 1, 1935 may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

49 USC § 307. Issuance of certificate—Issuance authorized to qualified applicants for regular routes and between fixed termini

Certificate not to confer proprietary or property rights in highway

(b) No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways.

49 USC § 309. Contract carriers by motor vehicle

(a) (1) Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to

such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided, . . .*

Otherwise the application for such permit shall be decided in accordance with the procedure provided for in subsection (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful.

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 310 of this title, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the

nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

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2. URGENT DEFICIENCIES ACT

28 USC § 2321. Procedure generally; process

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 USC § 2322. United States as party

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 USC § 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 USC § 2324. Stay of Commission's order

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

28 USC § 2325. Injunction; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor

is heard and determined by a district court of three judges under section 2284 of this title.

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3. ADMINISTRATIVE PROCEDURES ACT

5 USC § 551. Definitions

For the purpose of this subchapter—

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

5 USC § 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before board or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully

prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 USC § 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 USC § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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4. INTERSTATE COMMERCE COMMISSIONS GENERAL RULES OF PRACTICE (49 CFR § 1100)

Rule 4. Communications and pleadings generally—

(e) Ex parte communications prohibited; penalties provided. Ex parte communications as defined in Appendix C to this part are prohibited and any person violating the prohibitions set out in such Appendix is subject to the penalties as therein provided.

Rule 19. Pleadings part of record. Recitals of material and relevant facts in a pleading filed prior to oral hearing in any proceeding, unless specifically denied in a counterpleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a

competent witness must be made available for cross-examination on the evidence so included in the record. Pleadings may contain specific references to or quotation from the tariffs or schedules containing the several rates, fares, charges, schedules, classifications, regulations or practices alleged to be material. A filing under Rule 42 *Petitions for suspension of tariffs or schedules,* shall not be considered a pleading for purposes of this rule.

Rule 38. Applications—(a) Forms and instructions. An application filed with the Commission shall be prepared in accord with and contain the information called for in the form of application, if any, described by the Commission, or any instructions which may have been issued by the Commission with respect to the filing of an application.

(b) Copies; service. Copies of an application shall be furnished in such number, and be filed and served in the manner and upon the persons specified in the form or instruction.

Rule 55. Notice of hearing

(a) Assignment; service and posting of notice; electronically recorded transcript. In those proceedings in which a hearing is to be held, the Commission will, by order or otherwise, assign a time and place for hearing. Such action will include notice when the transcript is to be made by electronic recording. Notice of such hearing will be posted in the Office of the Secretary of the Commission and will be served upon the parties and such other persons as may be entitled to receive notice under the Act.

Rule 56. Subpoenas—(a) Requests; particularity. Unless directed by the Commission upon its own motion, a subpena to compel a witness to produce documentary evidence will be issued only upon petition showing general relevance and reasonable scope of the evidence sought, which petition must also specify with particularity the books, papers, or documents desired, and the facts expected to be proved thereby: *Provided, however,* That for good cause shown, in lieu of a petition, the request for such a subpena may be made orally upon the record to the officer presiding at the hearing. A request for issuance of a subpena other than to compel the production of documentary evidence may be made either by letter (original only need be filed with the Commission) or orally upon the record to the officer presiding at the hearing. A showing of general relevance and reasonable scope of the evidence sought may be required and the subpena will be issued or denied accordingly.

(b) Issuance. A subpena may be issued by the Commission or by the officer presiding at the hearing, but only under the signature of the Secretary or of a member of the Commission.

(c) Service. The original subpena shall be exhibited to the person served, shall be read to him if he is unable to read, and a copy thereof shall be delivered to him by the officer or person making service.

(d) Return. If service of subpena is made by a United States marshal or his deputy, such service shall be evidenced by his return thereon. If made by any other person, such person shall make affidavit thereof, stating

the date, time, and manner of service; and return such affidavit on, or with, the original subpena in accordance with the form thereon. In case of failure to make service the reasons for the failure shall be stated on the original subpena. The written acceptance of service of a subpena by the person named therein shall be sufficient without other evidence of return. The original subpena, bearing or accompanied by the required return, affidavit, statement, or acceptance of service, shall be returned forthwith to the Secretary of the Commission, or if so directed on the subpena, to the officer presiding at the hearing at which the person subpenaed is required to appear.

(e) Witness fees. A witness who is summoned and responds thereto is entitled to the same fee as is paid for like service in the courts of the United States. Such fee is to be paid by the party at whose instance the testimony is taken at the time the subpena is served, except that when the subpena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered at the time of service.

Rule 57. Depositions; preliminary—(a) When permissible. The Commission will either upon its own initiative, or for good cause shown by a party to a proceeding, issue an order to take a deposition.

(b) Officer before whom taken. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Within a foreign country a deposition may be taken before an officer or person

designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission.

(c) When taken. Unless under special circumstances and for good cause shown, no deposition shall be taken within 10 days prior to the assigned date of the hearing in such proceeding, and when the deposition is taken in a foreign country it shall not be taken within 30 days prior to such date of hearing.

(d) Fees. A witness whose deposition is taken pursuant to these rules and the officer taking same, unless he be employed by the Commission, shall be entitled to the same fee paid for like service in the courts of the United States, which fee shall be paid by the party at whose instance the deposition is taken.

Rule 58. Depositions; petitions. A petition requesting an order to take a deposition shall be filed with due regard to the time periods specified in rule 57(c) and shall set forth the name and address of the witness, the place where, the time when, the name and office of the officer before whom, and the cause or reason why such deposition should be taken.

Rule 59. Depositions; order; interrogatories—(a) Order. If the petition requesting an order to take a deposition is granted which action may be taken without awaiting the possible filing of a reply, the Commission will serve upon the parties an order which will name the witness whose deposition is to be taken, and specify the time when, the place where, and the officer before whom the witness is to testify, but such time and place, and the officer before whom the deposition is to be taken, so

specified in the Commission's order, may or may not be the same as set out in the petition.

(b) Interrogatories. In lieu of participating in the oral examination, parties served with the order for the taking of a deposition may promptly transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim, but it is not necessary that such interrogatories be served upon the party at whose instance the deposition is taken.

Rule 60. Depositions; recordation of testimony. The officer before whom the deposition is to be taken shall observe the provisions respecting appearances (rule 71(a)), and typographical specifications (rule 15), put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise to record the evidence.

Rule 61. Depositions; objections. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections.

Rule 62. Depositions; deponent's signature. When the testimony is fully transcribed or otherwise recorded the deposition of each witness shall be submitted to him for examination and shall be read to or by him. Any changes in form or substance which the witness desires to make

shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing, or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall state at the foot thereof the fact of the waiver or of the illness or absence of the witness, or the fact of the refusal to sign, together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless, on a motion to suppress, the Commission finds that the reasons given for the refusal to sign are sufficient to require rejection of the deposition in whole or in part.

Rule 63. Depositions; officer's attestation. The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and that the officer is not of counsel or attorney for any of the parties, and that he is not interested in the event of the proceedings.

Rule 64. Depositions; return to Commission. The officer shall securely seal the deposition in an envelope endorsed with the title of the proceeding, and shall promptly send the original and one copy thereof, together with the original and one copy of all exhibits, by registered mail to the Secretary of the Commission. The deposition must reach the Commission not later than 5 days before the date of the hearing at which it is to be offered as evidence.

Rule 65. Depositions; notice of filing. The party taking the deposition shall give prompt notice of its filing to all other parties.

Rule 66. Depositions; copies. Upon payment of reasonable charges therefor, the officer before whom the deposition is taken shall furnish a copy of it to any interested party or to the deponent.

Rule 67. Depositions; inclusion in record. At the oral hearing, if one is held, the deposition shall be offered in evidence by the party at whose instance it was taken. If not offered by such party, it may be offered in whole or in part by the adverse party. If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it, which is relevant to the part introduced, and any party may introduce any other parts. Such deposition shall be admissible in evidence subject to such objections as to competency of the witness, or to the competency, relevancy, or materiality of the testimony as were noted at the time of taking of said deposition, or are made at the time it is offered in evidence.

HEARINGS

Rule 68. Prehearing conferences—(a) Purposes. Upon written notice by the Commission in any proceeding, or upon written or oral instruction of an officer, parties or their attorneys may be directed to appear before an officer at a specified time and place for a conference, prior to or during the course of a hearing, or in lieu of personally appearing to submit suggestions in writing, for the purpose of formulating issues and considering:

(1) The simplification of issues;

(2) The necessity or desirability of amending the pleadings either for the purpose of clarification, amplification, or limitation;

(3) The possibility of making admissions of certain averments of fact or stipulations concerning the use by either or both parties of matters of public record, such as annual reports and the like, to the end of avoiding the unnecessary introduction of proof;

(4) The procedure at the hearing;

(5) The limitation of the number of witnesses;

(6) The propriety of prior mutual exchange between or among the parties of prepared testimony and exhibits; and

(7) Such other matters, including disposition of requests for discovery, as may aid in the simplification of the evidence and disposition of the proceeding.

(b) Facts disclosed privileged. Facts disclosed in the course of the prehearing conference are privileged and, except by agreement, shall not be used against participating parties either before the Commission or elsewhere unless fully substantiated by other evidence.

(c) Recordation and order. Action taken at the conference, including a recitation of the amendments allowed to the pleadings, the agreements made by the parties as to any of the matters considered and defining the issues, shall be recorded in an appropriate order, unless the parties enter upon a written stipulation as to such matters, or agree to a statement thereof made on the record by the officer.

(d) Objection to the order; subsequent proceedings. If an order is entered a reasonable time shall be allowed to the parties to present objections on the ground that it

does not fully or correctly embody the agreements reached at such conference. Thereafter the terms of the said order or modification thereof, the written stipulation, or statement of the officer, as the case may be, shall determine the subsequent course of the proceedings, unless modified to prevent manifest injustice.

Rule 69. Stipulations. Apart from the procedure contemplated by the prehearing provisions (rule 68), and upon permission granted, the parties may in the discretion of the officer, by stipulation in writing filed with the Commission at any stage of the proceeding, or orally made at the hearing, agree upon any pertinent facts in the proceeding. It is desired that the facts be thus agreed upon so far as and whenever practicable.

Rule 71. Appearances; standard of conduct; absence from hearing—(a) Who may appear. Any individual may appear for himself, and any member of a partnership which is a party to any proceeding may appear for such partnership upon adequate identification. A bona fide officer or a full-time employee of a corporation, association, or of an individual may appear for such corporation, association, or individual by permission of the officer presiding at the hearing. A party also may be represented by a practitioner.

(b) Appearances. An appearance may be either general, that is, without reservation, or it may be special, that is, confined to a particular issue or question. When a practitioner enters an appearance at a hearing he will be expected to represent his client faithfully until the completion of the proceeding in which he has been retained, or until the completion of [illegible] part of the proceeding for

which he has specially appeared. A practitioner who has entered his appearance at the hearing shall not be permitted to withdraw from the hearing, or willfully to absent himself therefrom, except for good cause and, wherever practicable, only with the permission of the presiding officer. If a person desires to appear specially, he must expressly so state when he enters his appearance and at that time he shall also state the questions or issues to which he is confining his appearance; otherwise, his appearance will be considered as general.

(c) Standard of conduct. Contemptuous conduct by any person appearing at a hearing shall be ground for his exclusion by the presiding officer from the hearing.

(d) Absence from hearing. If a party or his representative shall, after entering an appearance, attempt to withdraw from the hearing in a manner other than that specified in paragraph (b) of this rule, the Commission on its own motion, or on motion of any party to the proceeding, may take such action as, in the interest of justice and the protection of the lawful rights of all parties to the proceeding, the circumstances of the case may warrant, including the striking out of all or any part of any pleading of the offending party, and including the possible dismissal of the action or proceeding, or any part thereof, the entry of an order of default against that party, or the disciplining of the practitioner concerned.

Rule 72. Intervention; petitions—(a) Content generally. A petition for leave to intervene must set forth the grounds of the proposed intervention, the position and

interest of the petitioner in the proceeding, and whether petitioner's position is in support of or opposition to the relief sought. If the proceeding be by formal complaint and affirmative relief is sought by petitioner, the petition should conform to the requirements for a formal complaint.

(b) When filed. A petition for leave to intervene in any proceeding should be filed prior to or at the time the proceeding is called for hearing, but not after except for good cause shown.

(c) Broadening issues; filing. If the petitioner seeks a broadening of the issues and shows that they would not thereby be unduly broadened, and in respect thereof seeks affirmative relief, the petition should be filed in season to permit service upon and answer by the parties in advance of the hearing.

(d) Copies; service; replies. When tendered at the hearing, sufficient copies of a petition for leave to intervene must be provided for distribution as motion papers to the parties represented at the hearing. If leave be granted at the hearing, one additional copy must be furnished for the use of the Commission. When a petition for leave to intervene is not tendered at the hearing, the original and two copies of the petition shall be submitted to the Commission together with a certificate that service in accordance with Rule 22 has been made by petitioner. Any reply in opposition to a petition for leave to intervene not tendered at the hearing must be filed within 20 days after service. In the discretion of the Commission leave to intervene may be granted or denied before the expiration of the time allowed for replies.

(e) Disposition. Leave will not be granted except on averments reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted the petitioner thereby becomes an intervener and a party to the proceeding.

Rule 73. Participation without intervention. In an investigation proceeding, in a proceeding under paragraphs (18) to (20) inclusive of section 1 [49 U.S.C.A. § 1(18)-(20)], or sections 5 and 13a of Part I [49 U.S.C.A. § 5, 13a], in application proceedings under Parts II, III, and IV [49 U.S.C.A. §§ 301 et seq., 901 et seq., and 1001 et seq.], and in a proceeding of any one of the characters herein enumerated when heard on a consolidated record with a complaint proceeding, but in no other proceeding, an appearance may be entered at the hearing without filing a petition in intervention or other pleading, if no affirmative relief is sought, if there is full disclosure of the identity of the person or persons in whose behalf the appearance is to be entered, if the interest of such person in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed. A person in whose behalf an appearance is entered in this manner becomes a party to the proceeding.

Rule 75. Evidence; admissibility generally. Any evidence which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, shall be admissible in hearings before the Commission. The rules of

evidence shall be applied in any proceeding to the end that needful and proper evidence shall be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.

Rule 77. Evidence; prepared statements. With the approval of the officer, a witness may read into the record, as his testimony, statements of fact or expressions of his opinion prepared by him, or written answers to interrogatories of counsel, or a prepared statement of a witness who is present at the hearing may be received as an exhibit, provided that the statement shall not include argument; that before any such statement is read, or admitted in evidence the witness shall deliver to the officer, the reporter, and to opposing counsel as may be directed by the officer, a copy of such statement or of such interrogatories and his written answers thereto; and that the admissibility of the evidence contained in such statement shall be subject to the same rules as if such testimony were produced in the usual manner, including the right of cross-examination of the witness. Such approval ordinarily will be denied when in the opinion of the officer the memory or demeanor of the witness may be of importance.

Rule 78. Evidence; official records. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the

dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry. This rule does not prevent the proof of official records or of entry or lack of entry therein or official notice thereof by a method authorized by any applicable statute or by the rules of evidence.

Rule 79. Evidence; entries in regular course of business. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, will be admissible as evidence thereof if it shall appear that it was made in the regular course of business, and that it was the regular course of business to make such memorandum or record at the time such record was made, or within a reasonable time thereafter.

Rule 80. Evidence; documents containing matter not material. When material and relevant matter offered in evidence is in a document containing other matter not material or relevant, the offering party shall produce the document at the hearing, shall plainly designate the matter so offered, and shall accord to the officer and to participating counsel an opportunity to inspect it. Unless it is desired to read such matter into the record, and the officer so directs, true copies in proper form of the material and relevant matter taken from the document may be received as an exhibit, but other parties shall be afforded an opportunity to introduce in evidence, in like manner, other portions of such document if found to be material and relevant. The document itself will not be received.

Rule 82. Evidence; records in other Commission proceedings. If any portion of the record before the Commission in any proceeding other than the one on hearing is offered in evidence a true copy of such portion shall be presented for the record in the form of an exhibit unless:

(a) The party offering the same agrees to supply such copy later at his own expense, if and when required by the Commission; and

(b) The portion is specified with particularity in such manner as to be readily identified; and

(c) The parties represented at the hearing stipulate upon the record that such portion may be incorporated by reference, and that any other portion offered by any other party may be incorporated by like reference subject to paragraphs (a) and (b) of this rule; and

(d) The officer directs such incorporation. Any such portion so offered, whether in the form of an exhibit or by reference, shall be subject to objection.

Rule 83. Evidence; abstracts of documents. When documents, such as freight bills or bills of lading, are numerous, the officer may refuse to receive in evidence other than a limited number of such documents said to be typical. Instead he may instruct, if the proffer be for the purpose of proving damage, that introduction be deferred until there is opportunity to comply with rule 100. If the proffer be for other purpose the officer may require the party in orderly fashion to abstract the relevant data from the documents, affording other parties reasonable opportunity to examine both the documents and the abstract, and thereupon offer such abstract in evidence in exhibit form.

Rule 84. Evidence; exhibits—(a) Generally. Exhibits of a documentary character may have a maximum width of 22 inches by 12½ inches in height. Whenever practicable the sheets of each exhibit and the lines of each sheet should be numbered. If the exhibit consists of five or more sheets the first sheet or title-page should be confined to a brief statement of what the exhibit purports to show, with reference by sheet and line to illustrative or typical examples contained therein. The exhibit should bear an identifying number, letter, or short title which will readily distinguish it from other exhibits offered by the same party. It is desirable that, whenever practicable, rate comparisons and other evidence should be condensed into tables. Whenever practicable, especially in proceedings in which it is likely that many documents

will be offered, all the documents produced by a single witness should be assembled and bound together, suitably arranged and indexed, so that they may be identified and offered as one exhibit. Exhibits should not be argumentative and should be limited to statements of fact, and be relevant and material to the issue, which can better be shown in that form than by oral testimony.

(b) Reference to tariff authority, routes, and distances. All exhibits showing rates, fares, charges, or other tariff or schedule provisions must, by appropriate Interstate Commerce Commission number reference, indicate the tariff or schedule authority therefor, and if distances are shown must also show the authority therefor and, by lines, highways, or waterways, and junction points, the routes over which the distances are computed; except that the routes over which the distances are computed need not be shown when such distances are specifically published in a tariff or schedule lawfully on file with the Commission, or definitely ascertainable from a tariff or schedule on file with the Commission showing rates prescribed by the Commission and based on short-line distances, or short-highway distances, provided the exhibit makes specific reference to such tariff or schedules as provided by this rule.

(c) Copies. Unless the officer shall otherwise direct, the original and one copy of each exhibit of a documentary character shall be furnished for the use of the Commission—original to be delivered to the reporter, and the copy to the officer. If the hearing be before a board, a copy of the exhibit shall be furnished to each member of the board, unless the board otherwise directs. Unless

the officer for cause directs otherwise, a reasonable number of copies shall be furnished to counsel in attendance at the hearing. Unless the officer shall otherwise direct, in proceedings under the Uniform Bankruptcy Act [11 U.S.C.A. § 1 et seq.], the original and three copies of every exhibit of a documentary character shall be furnished for use of the Commission—original to be delivered to the reporter, and the three copies to the officer.

(d) Interchange prior to hearing. Whenever practicable, the parties should interchange copies of exhibits or other pertinent material or matter before or at the commencement of the hearing; and the Commission or presiding officer may so direct.

(e) When excluded how treated. In case an exhibit has been identified, objected to, and excluded, the officer will develop whether the party offering the exhibit withdraws the offer, and if so, permit the return of the exhibit to him. If the excluded exhibit is not withdrawn it should be given an exhibit number for identification and be incorporated in the record. Exhibit numbers once used for identification will not be duplicated thereafter.

Rule 86. Evidence; filing of subsequent to hearing; copies. Except as provided below or as expressly may be permitted in a particular instance, the Commission will not receive in evidence or consider as part of the record any documents, letters, or other writings submitted for consideration in connection with any proceeding after close of the hearing, and may return any such documents to the sender. Before the close of a hearing the officer may, at the request of a party or upon his own motion, or upon agreement of the parties, require that a party

furnish additional documentary evidence supplementary to the existing record, within a stated period of time. Documentary evidence thus to be furnished will not be assigned an exhibit number at the hearing, but the document will be given an exhibit number at the time of filing and the parties accordingly advised. Unless otherwise directed by the officer, the original and one copy of such submission shall be filed with the Commission.

Rule 87. Evidence; objections to. Formal exception to a ruling of an officer at a hearing is unnecessary. It is sufficient that a party, at the time the ruling is made or sought, make known to the officer on the record the action which he desires the officer to take or his objection to the action of the officer and his grounds therefor. An objection not pressed in brief will be considered as waived. Where no brief is filed an objection will be considered as waived if not pressed in exceptions or reply to exceptions, if filed, or in a separate petition dealing only with that objection.

Rule 88. Oral argument before officer

If oral argument before the officer is desired, he should be so notified at or before the hearing and may arrange to hear the argument at the close of the testimony within such limits of times as he may determine, having regard to other assignments for hearing before him. Such argument will be recorded and made a part of the transcript of testimony, and will be available to the Commission for consideration in deciding the case. The making of such argument shall not preclude oral argument before the Commission and request therefor may be made as provided in Rule 98.

Rule 89. Continuance for further hearing. A continuance may be granted by the presiding officer if it is impossible to conclude a hearing within the time available, or for any reason a continuance is necessary or advisable, but a joint board shall not set a date and place for a continued hearing without first consulting the Commission. If consultation with the Commission is impracticable, the hearing shall be adjourned by the joint board to such time and place as the Commission subsequently shall determine.

Rule 90. Transcript of record—(a) Filing. After the close of the hearing the complete transcript of testimony taken and the exhibits shall be filed with the Commission.

(b) Corrections. A suggested correction in a transcript ordinarily will be considered only if offered not later than 20 days after the date each transcript is filed with the Commission. A copy of the letter (original only need be filed with the Commission) requesting the suggested corrections shall be served upon all parties of record and with 2 copies to the official reporter.

(c) No free copies. No free copies of transcript will be furnished to any party to any proceeding.

Rule 91. Briefs; content and arrangement—(a) Due date. The due date of each brief must appear on its front cover or title page.

(b) Table of contents; citations. A brief of more than 20 pages shall contain on its front flyleaves a table of contents and points made with page references, the table of contents to be supplemented by a list of citations, alphabetically arranged, with references to the pages where they appear.

(c) Sketch or chart. In proceedings wherein misrouting or undue prejudice or preference are alleged, the complainant should include as part of the brief a small sketch or chart adequately reflecting the situation.

(d) Evidence abstract. A brief filed after a hearing should contain an abstract of the evidence relied upon by the party filing it, preferably assembled by subjects, with reference to the pages of the record, if written, or exhibit where the evidence appears. The abstract should follow the statement of the case and precede the argument. In the event the party elects not to include a separate abstract in his brief, he should give specific reference to the portions of the record, whether transcript or otherwise relied upon in support of the respective statements of fact made throughout the brief.

(e) Requested findings. Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make.

(f) Exhibit reproduction. Exhibits should not be reproduced in the brief, but may, if desired, be shown, within reasonable limits, in an appendix to the brief. Analyses of such exhibits should be included in the abstract of evidence under the subjects to which they pertain.

Rule 92. Briefs; when officer's report is served

In a proceeding which has been the subject of oral hearing, and in which an officer's report is to be prepared and served, which fact will be stated by the officer on the record, only one brief shall be filed by each party. The officer shall fix for all parties the same time within which to file briefs, which time shall not exceed 45 days from

the close of the hearing unless otherwise ordered by the Commission. Reply briefs are not permitted unless ordered by the Commission.

Rule 93. Briefs; when officer's report is not served

In a proceeding which has been the subject of oral hearing, and in which no officer's report is to be prepared and served, which fact will be stated by the officer on the record, only one brief shall be filed by each party. The officer shall fix for all parties the same time within which to file briefs, which time shall not exceed 45 days from the close of the hearing unless otherwise ordered by the Commission. Reply briefs are not permitted unless ordered by the Commission.

Rule 94. Briefs of interveners

Briefs of interveners shall be filed and served within the time fixed for the brief or the party in whose behalf the intervention is made.

Rule 95. Officer's report; when and how served. After expiration of the time set for filing briefs, if the proceeding be one in which a hearing has been held, the officer's report will be prepared and served by mailing a copy to each party. An officer's report prepared in a proceeding in which a hearing has not been held will be served by mailing a copy to each party of record and to any other persons not parties to the proceeding who are believed to have an interest in the proceeding.

Rule 97. Effect of exceptions or absence thereof—(a) Upon report and recommended order. The filing of exceptions to a recommended order operates to stay the effectiveness of the order and thereafter decision by the Commission will be made in due course. If no exception

is filed to the recommended order and the Commission does not stay it, the recommended order becomes the order of the Commission upon expiration of the period for filing exceptions provided in rule 96(b), or of any postponement of such period, or postponement of the effective date of such order, and a notice stating that the recommended order has, giving the date, become the order of the Commission will be mailed to the parties by the Commission.

(b) Upon proposed report. A proposed report will not become the decision of the Commission through failure to file objections, but in the absence of exceptions or of ascertained error the officer's statement of the issues and of the facts ordinarily will be taken by the Commission as the basis of its decision.

Rule 98. Oral argument before Commission—(a) Request; how made. If no officer's report is to be served, request for oral argument before the Commission must be made at hearing or by letter (original only need be filed with the Commission) within 10 days after the hearing. If an officer's report is to be served, the request for oral argument must be included as part of the exceptions brief or reply thereto.

(b) Request for time allotment. If the petition is granted a notice will be served by the Commission upon the parties setting the date for the oral argument. At least 10 days before that date any party desiring to participate in the oral argument must make request by letter (original only need be filed with the Commission) for an allotment of time. Only those making request in this manner will be permitted to participate.

Rule 102. Petitions not otherwise covered

When the subject matter of any desired relief is not specifically covered by the rules in this part, a petition seeking such relief, which relief shall be construed as including appropriate discovery procedures, and stating the reasons therefor may be served and filed.

Rule 247. Special rules governing notice of filing of applications by motor carriers of property or passengers and brokers under sections 206 (except section 206(a) (6) relating to Certificates of Registration), 209, and 211, by water carriers under sections 302(e), 303, and 309, and by freight forwarders under section 410 of the Interstate Commerce Act, and certain other procedural matters with respect thereto.

(a) Scope and applicability of special rules—(1) Scope. These special rules govern the filing and handling pursuant to the provisions of the Interstate Commerce Act of (i) applications for certificates, permits, and licenses respecting the transportation of property or passengers under sections 206 [49 U.S.C.A. § 306] (except section 206(a)(6) [49 U.S.C.A. § 306(a)(6)] relating to Certificates of Registration), 209, and 211 [49 U.S.C.A. §§ 309, and 311], (ii) applications for certificates, permits, and exemptions respecting the water transportation of property or passengers under sections 302(e), 303, and 309 [49 U.S.C.A. §§ 902(e), 903, and 909], and (iii) applications for permits to operate as freight forwarders and for certificates of abandonment under section 410 [49 U.S.C.A. § 1010]. Except as otherwise herein provided, the general rules of practice shall apply.

(2) Applicability. These special rules shall apply to all applications enumerated in subparagraph (1) of this paragraph and filed with the Commission on and after May 20, 1966, and to such of those applications filed prior to that time as the Commission may designate by appropriate publication in the FEDERAL REGISTER.

(b) Applications—(1) Form and content. An application filed with the Commission under these special rules shall be prepared in accord with and contain the information called for in the form of application prescribed by the Commission or in instructions which may have been issued by the Commission with respect to the filing of such an application.

(2) Copies and service. Copies of an application filed under these special rules shall be furnished in such number and shall be filed and served in the manner and upon the persons specified in the form or instructions.

(3) Requests for handling applications without oral hearing. An applicant who believes its application is susceptible of handling without oral hearing may request such handling when the application is filed. If such a request is made at that time, the applicant shall submit with its application original verified statements of the facts to which its witnesses would testify at an oral hearing if one were held, together with one copy thereof which need not be verified. Applicant shall furnish copies of its verified statements to interested persons upon request from such interested persons.

(c) Notice to interested persons. (1) Notice of the filing of applications to competitors and other interested persons will be given by the publication of a summary of

the authority sought in the FEDERAL REGISTER. Such summaries will be prepared by the Commission, and it shall be the responsibility of applicant promptly to advise the Commission if the summary does not properly describe the authority sought. No other notice by applicants to interested persons is required, except that applicants are not relieved from the obligation to file copies of applications with Governors, State Boards, and Regional Directors of the Commission's Bureau of Operations and Compliance as may be required by the prescribed form of the application.

(2) Amendments. Except for good cause shown, amendments to applications which broaden the scope of the proposed operations will not be allowed if tendered after notice of the filing of an application has been published in the *Federal Register*. Restrictive amendments acceptable to the Commission may be submitted at any time, but if tendered after such publication, they may be allowed only in the discretion of the Commission or by the hearing officer if the matter is assigned for hearing or prehearing conference.

(6) Except where a restrictive amendment has been made as provided in subparagraph (5) of this paragraph, or for good cause shown, the failure of any person filing a protest to an application to appear at a hearing scheduled thereon shall be construed as a waiver of its right to participate further in the proceeding; such person shall no longer be considered as a party to the proceeding, and it and any representative responsible for its participation in the proceeding may be subject to censure for failure to appear. In addition, the mere appearance of protestant

without the presentation of evidence of protestant's own operations and particular interest in the application may, in the absence of good cause shown, subject protestant and its representative to similar censure.

(7) An interested person, not a protestant, desiring to receive notice of the time and place of any hearing, conference, or other proceedings shall notify the Commission by telegram or letter (original and one copy) within 30 days from the date of the publication of the notice of the filing of the application in the FEDERAL REGISTER.

(c) Hearing or other procedures to be followed—(1) Determination. The Commission will determine whether an assignment for oral hearing should be made, after notice to interested persons of the filing of the application has been published in the FEDERAL REGISTER and the period for filing protests has expired. At or prior to such time, any applicant who does not intend to prosecute its application should promptly request dismissal thereof.

(2) Uncontested proceedings. Proceedings in which no protests are filed within 30 days after publication of notice in the FEDERAL REGISTER, and which are not assigned for oral hearing, will be determined on the basis of verified statements submitted by applicant. Where not submitted previously along with the application as provided in paragraph (b) (3) of this section, such statements, by order, will be required to be filed by the applicant with the Commission within the time prescribed in said order, failing which the application may be summarily dismissed for want of prosecution.

(3) Contested proceedings. In those contested proceedings which the Commission determines that assign-

ment of an application for oral hearing is unnecessary, thereafter the procedure shall be in accordance with Rules 45(b), 46(b), and 47-54, inclusive, of the general rules of practice, except that only the original and one copy of any statement made pursuant to Rule 51 need be filed with the Commission. All other contested proceedings which are subject to these rules will be assigned for oral hearing, unless other procedures are ordered.

(f) Withdrawal or dismissal of contested applications. If protests to its application have been filed, applicant shall, within 30 days after the period for filing protests has expired, notify the Commission in writing (1) that it is ready to proceed and prosecute the application, or (2) that it wishes to withdraw the application. Failure so to notify the Commission will be construed to mean that applicant has no further interest in the application, and the application will thereupon be dismissed by the Commission. Withdrawal of the application after the 30-day period or failure by applicant to appear at a hearing scheduled thereon will, except for good cause shown, subject applicant and its representative to censure.

(g) Notice of hearing, conference or other proceedings —(1) Initial assignment. Notice of the time and place of any hearing, conference, or other proceedings will be given to applicant's representative, applicant, protestants, and other interested parties by mailing to them the order or notice assigning the application for hearing, conference, or other procedure.

(2) Assignment of an application for hearing concurrently with notice of its filing. For the convenience of the Commission in handling applications related to one or

more applications which already have been noticed in the FEDERAL REGISTER, when, in the Commission's discretion, the public interest would be served, an application may be concurrently noticed and assigned for hearing provided appropriate publication in the FEDERAL REGISTER can be made at least 1 week prior to the assigned date of hearing. Where such action is taken, and regardless of any prior publication of the application, any interested person may, without filing a protest prior to the assigned hearing, appear at the hearing in opposition to the application so assigned and become a party and be entitled to participate in that proceeding.

(3) Requests for change. A request by any party for a change in the time or place of an assigned hearing must set forth good and sufficient cause for the action requested, must be in writing and filed with the Commission not less than 10 days before the assigned hearing date, except in emergency circumstances, and must be served on all known parties of record at the same time and by the same method of communication as service is made on the Commission. Where such requests are filed less than 10 days before the date of hearing, the petitioning party shall state the reasons for his failure to make such request within the prescribed 10 days.

(4) Notice of changes. The applicant's representative (or applicant if it has no representative), protestants, and those who request notice of changes in time or place of hearing, conference, or other proceeding will be informed of such changes if notice is given by mail. If telegraphic notice becomes necessary, notice of such changes will be given by telegram only to those who request telegraphic notice at their expense.

(h) Intervention. Rule 73 relating to participation without intervention is inapplicable to applications subject to this section, except with respect to those persons seeking to intervene in support. No person who fails to file a protest as provided in these rules will be permitted to intervene in opposition in a proceeding except upon a showing of substantial reasons in a petition submitted in accordance with Rule 72.

(i) Drafting of recommended order and report by prevailing party. Applications in which oral hearings are held and in which the hearing officer can announce his decision, either (1) on the record after the close of the taking of testimony or (2) by appropriate notification to the parties after the filing of briefs, may be made the subject of a report and recommended order, prepared by the party or parties in whose favor the hearing officer decides, within a period specified by the hearing officer. The hearing officer will make such changes as he considers appropriate in the draft prepared for him.

Appendix A—Code of Ethics for Practitioners Before the Interstate Commerce Commission

Preamble

No rules of conduct can be framed which will particularize all the duties of the practitioner in the varying phases of litigation or in his relations to clients, adversaries, other practitioners, the Commission and the public. The following canons of ethics are adopted as a general guide for those admitted to practice before the Interstate Commerce Commission.

It will be remembered that the practitioners before the Commission include (a) lawyers, who have been regularly

admitted to practice law, and (b) others having traffic or other technical experience qualifying them to aid the Commission in administration of the Interstate Commerce Act and related acts of Congress. The former are bound by a broad code of ethics and unwritten rules of professional conduct which apply to every activity of a lawyer; for the latter, no code of ethics has been written heretofore. The following canons do not release the lawyer from any of the duties or principles of professional conduct by which lawyers are bound. They apply alike to all practitioners before the Commission and the setting forth therein of particular duties or principles of conduct should not be construed as a denial of the existence of others equally imperative although not specifically mentioned. The word "Commission" as used herein includes Divisions of the Commission, and the representatives of the Commission, whether members, examiners, or other employees connected with the matter in hand.

Canons of Ethics

1. *Standards of ethical conduct in courts of United States to be observed.* These canons are in furtherance of the purpose of the Commission's rules of practice which enjoin upon all persons appearing in proceedings before it to conform, as nearly as may be, to the standards of ethical conduct required of practitioners before the courts of the United States; and such standards are taken as the basis for these specifications, modified in so far as the nature of the practice before the Commission requires.

2. *The duty of the practitioner to and his attitude towards the Commission.* It is the duty of the practitioner to maintain towards the Commission a respectful

attitude, not for the sake of the temporary incumbent of the office, but for the maintenance of the importance of the functions he administers. *In many respects the Commission functions as a Court, and practitioners should regard themselves as officers of that Court and strive to uphold its honor and dignity.* The Commission, not being wholly free to defend itself is peculiarly entitled to receive the support of the practitioner against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a member or employee of the Commission it is the right and duty of the practitioner to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

4. *Attempts to exert political influence on the Commission.* It is unethical for a practitioner to attempt to sway the judgment of the Commission by propaganda, or by enlisting the influence or intercession of members of the Congress or other public officers, or by threats of political or personal reprisal.

5. *Attempts to exert personal influence on the Commission.* Marked attention and unusual hospitality on the part of a practitioner to a Commissioner, examiner, or other representative of the Commission, uncalled for and unwarranted by the personal relations of the parties, subject both to misconstruction of motive and should be avoided. A self-respecting independence in the discharge of duty, without denial or diminution of the courtesy and respect due the official station is the only proper foundation for cordial personal and official relations between Commission and practitioners.

7. The practitioner's duty in its last analysis. No client, corporate or individual, however powerful, no cause, civil or political however important, is entitled to receive, and no practitioner should render, any service or advice involving disloyalty to the law or disrespect of its official ministers, or corruption of any person or persons exercising a public office or employment or private trust, or deception or betrayal of the public. In rendering any such improper service or advice the practitioner invites and merits stern and just condemnation. Correspondingly, he advances the honor of his calling and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, although until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all he will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

8. Private communications with the Commission. In the disposition of contested proceedings brought under the Interstate Commerce Act [49 U.S.C.A. §§1 et seq., 301 et seq., 901 et seq., 1001 et seq., 1231 et seq.] the Commission exercises quasi-legislative powers, but it is nevertheless acting in a quasi-judicial capacity. It is required to administer the Act and to consider at all times the public interest beyond the mere interest of the particular liti-

gants before it. *To the extent that it acts in a quasi-judicial capacity, it is grossly improper for litigants, directly or through any counsel or representative, to communicate privately with a commissioner, examiner or other representative of the Commission about a pending cause, or to argue privately the merits thereof in the absence of their adversaries or without notice to them.* Practitioners at all times should scrupulously refrain in their communications to and discussions with the Commission and its staff from going beyond ex parte representations that are clearly proper in view of the administrative work of the Commission.

9. *Adverse influences and conflicting interests.* It is the duty of a practitioner at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of the person to represent or assist him.

It is unethical to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon a practitioner represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

10. Joint association of practitioners and conflicts of opinion. A client's proffer of the assistance of additional practitioner should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A practitioner should decline association as colleague if it is objectionable to the practitioner first retained, but if the client should relieve the practitioner first retained, another may come into the case.

When practitioners jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted by them unless the nature of the difference makes it impracticable for the practitioner whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another practitioner are unworthy of those who should be brethren, but, nevertheless, it is the right of any practitioner, without fear or favor, to give proper advice to those seeking relief against an unfaithful or neglectful practitioner, generally after communication with the practitioner of whom the complaint is made.

11. Withdrawal from employment. The right of a practitioner to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The practitioner representing him should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or im-

moral course in the conduct of his case, or if he persists over the practitioner's remonstrance in presenting frivilous defenses, or if he deliberately disregards an agreement or obligations as to fees or expenses, the practitioner may be warranted in withdrawing on due notice to the client, allowing him time to employ another. So also when a practitioner discovers that his client has no case and the client is determined to continue it; or even if he finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, he should refund such part of the retainer as has not been clearly earned.

12. Advising upon the merits of a client's cause. A practitioner should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. He should beware of bold and confident assurances to clients, especially where employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

13. Negotiations with opposing party. A practitioner should not in any way communicate upon the subject of controversy with a party represented by another practitioner except upon express agreement with the practitioner representing such party; much less should he undertake to negotiate or compromise the matter with him, but should deal only with the practitioner who represents the other party. It is incumbent upon the practi-

tioner most particularly to avoid everything that may tend to mislead a party not represented by a practitioner, and he should not undertake to advise him as to the law.

14. *Fixing the amount of the fee.* In fixing fees, practitioners should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, although his poverty may require a less charge, or even none at all.

15. *Compensation, commission and rebates.* A practitioner should accept no compensation, commissions, rebates, or other advantages from parties to the proceeding other than his client without the knowledge and consent of his client after full disclosure.

16. *Contingent fees.* Contingent fees should be such only as are sanctioned by law. In no case, except a charity case, should they be entirely contingent upon success.

17. *Division of fees.* No division of fees for services is proper, except with a member of the bar or with another practitioner, based upon a division of service or responsibility. It is unethical for a practitioner to retain laymen to solicit his employment in pending or prospective cases, and reward them by a division of fees, and such a practice cannot be too severely condemned.

18. *Suing clients for fees.* Controversies with clients covering compensation are to be avoided in so far as compatible with self-respect and with the right to receive reasonable recompense for services; and lawsuits against clients should be resorted to only to prevent injustice, imposition or fraud.

19. Acquiring interest in litigation. The practitioner shall not purchase or otherwise acquire any pecuniary interest in the subject matter of the litigation which he is conducting.

20. Expenses. A practitioner may not properly agree with a client that the practitioner shall pay or bear the expenses of litigation. He may in good faith advance expenses as a matter of convenience but subject to reimbursement by the client.

21. Witnesses. A practitioner shall not undertake that the compensation of a witness shall be contingent upon the success of the cause in which he is called. If the ascertainment of truth requires that a practitioner should seek information from one connected with or reputed to be biased in favor of an adverse party, he is not thereby deterred from seeking to ascertain the truth from such person in the interest of his client.

22. Dealing with trust property. Money of the client or other trust property coming into the possession of the practitioner should be reported promptly, and, except with the client's knowledge and consent, should not be commingled with the practitioner's private property or be used by him.

23. How far a practitioner may go in supporting a client's cause. Nothing will operate more certainly to create or foster popular prejudice against practitioners as a class, and deprive them of that full measure of public esteem and confidence which belongs to the proper discharge of their duties than does the false claim, often set up by the unscrupulous in defense of questionable trans-

actions, that it is the duty of the practitioner to do whatever may enable him to succeed in winning his client's cause.

The practitioner owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of the disfavor of the Commission or public unpopularity should restrain him from full discharge of his duty. The client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his counsel to assert every such remedy or defense. But it is to be steadfastly borne in mind that this great trust is to be performed within and not without the bounds of the law. Admission to the privilege of appearing before the Commission as representing another does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

24. *Restraining clients from improprieties.* A practitioner should use his best efforts to restrain and to prevent his clients from doing those things which he himself ought not to do, particularly with reference to their conduct towards the Commission, other practitioners, witnesses and suitors. If a client persists in such wrongdoing the practitioner should terminate their relations.

25. *Ill-feeling and personalities between advocates.* Clients, not their representatives, are the litigants. Whatever may be the ill-feeling existing between clients, it

should not be allowed to influence practitioners in their conduct and demeanor toward each other or toward suitors in the case. All personalities between practitioners should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncracies of practitioners on the other side. Personal colloquies between practitioners which cause delay and promote unseemly wrangling should also be carefully avoided. Their statement should be addressed to the Commission.

26. Treatment of witnesses and litigants. A practitioner should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudice of a client in the trial or conduct of a cause. The client cannot be made the keeper of the practitioner's conscience in such matters. He has no right to demand that the practitioner representing him shall abuse the opposing party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

27. (None.)

28. Discussion of pending litigation in public press. Attempts to influence the action and attitude of the members and examiners of the Commission through propaganda, or through colored or distorted articles, in the public press, are more apt to react against than in favor of the parties resorting to such measures. On the other hand, it is not against the public interest or unfair to the Commission that the facts of pending litigation shall be made known to the public through the press in a fair and

unbiased manner and in dispassionate terms. Practitioners should themselves avoid, and should counsel their clients against, giving to the public press any press notices or statements of a nature intended to inflame the public mind, to stir up possible hostility toward the Commission, or to influence the Commission's course and judgment as to pending or anticipated litigation. When the circumstances of a particular case appear to justify a statement to the public through the press, it is unethical to make it anonymously.

29. Candor and fairness. The conduct of practitioners before the Commission and with other practitioners should be characterized by candor and fairness. The non-technical character and liberality of the Commission's practice call for scrupulous observance of the principles of fair dealing and just considerations for the rights of others.

It is not candid or fair for a practitioner knowingly to misstate or misquote the contents of a paper, the testimony of a witness, the language or the argument of an opposing practitioner, or the language or effect of a decision or a text book; or, with knowledge of its invalidity to cite as authority a decision which has been overruled or otherwise impaired as a precedent or a statute which has been repealed; or in argument to assert as a fact that which has not been proved, or to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A practitioner should not offer evidence, which he knows the Commission should reject, in order to get the same before the Commission by argument for its admissibility, or arguments upon any point not properly calling for determination. He should not introduce into an argument remarks or statements intended to influence the bystanders.

These and all kindred practices are unethical and unworthy of a practitioner.

30. *Right of practitioner to control the incidents of the trial.* As to incidental matters pending the trial, not affecting the merits of the cause or working substantial prejudice to the rights of the client, such as forcing the opposing practitioner to trial when he is under affliction or bereavement, forcing the trial on a particular day to the injury of the opposing practitioner when no harm will result from trial at a different time, agreeing to extensions of time and the like, the practitioner and not the client, must be allowed to judge. In such matters no client has a right to demand that his practitioner shall be illiberal or do anything therein repugnant to the practitioner's sense of honor and propriety.

31. *Taking technical advantage of opposing practitioner; agreements with him.* A practitioner should not ignore known customs or practice of the Commission, even when the law permits, without giving timely notice to the opposing practitioner. In so far as possible, important agreements affecting the rights of clients should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing.

32. Advertising, direct or indirect. The most worthy and effective advertisement possible is the establishment of a well-merited reputation for capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not improper. But solicitation of employment by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unethical. It is equally unethical to procure business by indirection through touters of any kind. Indirect advertisement for employment by furnishing or inspiring newspaper comments concerning causes in which the practitioner has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the practitioner's positions, and all other like self-laudation, lower the tone of the calling and are intolerable.

33. Professional card. The simple professional card mentioned in Canon 32 may with propriety contain only a statement of the practitioner's name (and those of his associates), occupation, address, telephone number, and special branch or branches of practice. Such cards may be inserted in reputable lists and may give authorized references, or name clients with their permission.

34. Stirring up litigation, directly or through agents. It is unethical for a practitioner to volunteer advice that a proceeding be brought before the Commission, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is

not only unethical but it is indictable at common law. It is disreputable for a practitioner to hunt up defects or other causes of action and disclose them in order to be employed to bring complaint, or to breed litigation by seeking out those having claims for damages or any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office to seek his services. No complaint should be brought before the Commission by a practitioner except with the distinct knowledge and specific consent of the client in the particular case. A duty to the public and to the Association devolves upon every member having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disciplined or disbarred.

35. *Justifiable and unjustifiable litigation.* The practitioner must decline to conduct a cause or to make a defense when convinced that it is intended merely to harass or to injure the opposing party, or to work oppression or wrong. But otherwise it is his right, and having accepted retainer, it becomes his duty, to insist upon the judgment of the Commission as to the merits of his client's claim. His appearance should be deemed equivalent to an assertion upon his honor that in his opinion his client's case is one proper for determination.

36. *Responsibility for litigation.* No practitioner is obliged to act either as adviser or advocate for every person who may seek to become his client. He has the right to decline employment. Every practitioner upon his own re-

sponsibility must decide what employment he will accept, what causes he will bring before the Commission for complainants, or contest for defendants or respondents. The responsibility for advising as to questionable transactions, for bringing questionable proceedings, for urging questionable defenses is his alone. He cannot escape it by urging as excuses that he is only following his client's instructions, or that he is under a stated retainer or in the regular employment of his client.

37. *Discovery of imposition and deception.* When a practitioner discovers that some fraud or deception has been practiced, which has been unjustly imposed upon the Commission or a party, he should endeavor to rectify it: first by advising his client to forego any advantage thus unjustly gained and, if his client refuses, by promptly informing the injured person or his counsel (practitioner), so that appropriate steps may be taken.

38. *Upholding the honor of the calling.* Practitioners should expose without fear or favor before the proper tribunals corrupt or dishonest conduct and should accept without hesitation employment against a practitioner who has wronged his client. The practitioner upon the trial of a cause in which perjury has been committed owes it to the Commission and to the public to bring the matter to the knowledge of the prosecuting authorities. The practitioner should aid in guarding the bar of the Commission against admission thereto of candidates unfit or unqualified because deficient in either moral character or education. A practitioner should propose no person for admission to practice before the Commission unless from personal knowledge or upon reasonable inquiry he sin-

cerely believes and is able to vouch that such person possesses the qualifications prescribed in the Commission's rules of practice. He should strive at all times to uphold the honor and maintain the dignity of his calling and to improve not only the law but the administration of justice.

39. Intermediaries. The services of a practitioner should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and practitioner. His responsibility and qualifications are individual. He should avoid all relations which direct the performance of his duties in the interest of such intermediaries. His relation to the client should be personal, and the responsibility should be direct to the client.

He may accept employment from any organization such as an association, club or trade organization, authorized by law to be a party to proceedings before the Commission, to render services in such proceedings in any matter in which the organization, as an entity, is interested. This employment should only include the rendering of such services to the members of the organization in respect to their individual affairs as are consistent with the free and untrammeled performance of his duties to the Commission.

Nothing in this canon shall be construed as conflicting with canon 17.

40. Retirement from public employment. A practitioner, having once held public office or having been in the public employ, should not after his retirement, accept employment as an advocate or adviser in the same proceeding or as to the same, or substantially the same, facts as were involved in any specific question which he

investigated or passed upon in a judicial or quasi-judicial capacity while in such office or employ, whether the same or different parties are concerned.

41. Confidences of a client. The duty to preserve his client's confidences in the course of his employment outlasts the practitioner's employment, and extends as well to his employees. None of them should accept employment which involves the disclosure or use of these confidences, either for the private advantage of the practitioner or his employees or to the disadvantage of the client, without knowledge and consent of the client even though there are other available sources of such information. A practitioner should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a practitioner is falsely accused by his client, he is not precluded from disclosing the truth in respect to the false accusation. The announced intention of a client to commit a crime is not included within the confidences which a practitioner is bound to respect. He may properly make such disclosures as to prevent the act or protect those against whom it is threatened.

Appendix C—Ex Parte Communications

1. Ex parte communications. (a) No person who is a party to, or counsel or agent of a party, or who intercedes in, any on-the-record proceeding, shall submit any ex parte communication concerning the merits of the proceeding to any member of the Commission, hearing officer, member of a joint board, or to any employee of the Commission participating in the decision in such proceeding.

(b) No member of the Commission, hearing officer, member of a joint board, or employee of the Commission participating in the decision in such proceedings shall invite or knowingly entertain any prohibited ex parte communication, or make any such communication to any party to, or counsel or agent of a party, or any other person who he has reason to know may transmit such communication to a party or party's agent.

2. The prohibitions of paragraph 1 apply from the time an on-the-record proceeding is noticed for oral hearing or the taking of evidence by modified procedure or from such earlier time as the Commission may fix by rule or order in the particular case.

3. For the purposes hereof:

(a) "On-the-record proceeding" means a proceeding required by the Constitution, by statute, by Commission rule, or by order in the particular case, to be decided solely upon the record made in a Commission hearing.

(b) "Person who intercedes in any proceeding" means any individual outside the Commission (whether in public or private life), partnership, corporation, or association, other than a party or an agent of a party, who volunteers a communication which he may be expected to know may advance or adversely affect the interest of a particular party to the proceeding, whether or not he acts with the knowledge or consent of any party or any party's agent.

(c) "Ex parte communication concerning the merits" includes both oral and written communications, but the following classes of ex parte communications shall not be prohibited:

(1) Any oral or written communication which all the parties to the proceeding agree, or which the Commission, the hearing officer, or joint board formally rules, may be made on an ex parte basis.

(2) Any oral or written communication of facts or contentions which have general significance for an industry subject to regulation if the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive issue in appending on-the-record proceeding in which he is interested.

(3) Any communication by means of any news medium which in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publications with respect to pending on-the-record proceedings.

(d) "Any employee of the Commission participating in the decision" includes personal assistants to members of the Commission, members of an employee review board appointed pursuant to Public Law 87247 (1961) to whom the proceeding may be referred for decision, employees of the Commission Bureau (e.g., Operating Rights, Finance, Rates and Practices) whose responsibilities correspond to the nature of the proceeding, and the staff of the General Counsel's Office.

4. Any member of the Commission, hearing officer, employer of the Commission, or member of a joint board, participating in the decision who personally receives a written or oral communication which he believes is prohibited at the time received, shall transmit the written communication or a written summary of the substance of an oral communication promptly to the Chairman of the

Commission together with a written statement of the circumstances under which the communication was made, if not apparent from the communication itself. If the Chairman concludes that the communication is prohibited, or that the dictates of fairness require that it be made public, he shall instruct the Secretary to place the written communication or summary of the oral communication in the correspondence part of the public docket of the proceeding or take such other or further action as may be appropriate under all of the circumstances.

5. The Commission may censure, or suspend or revoke the privilege to practice before the agency, of any person who knowingly and willfully makes or solicits the making of a prohibited ex parte communication.

6. To the extent permitted by law, the relief or benefit sought by a party to a proceeding may be denied if the party, or an agent of the party, knowingly and willfully makes or solicits the making of a prohibited communication.

7. The Commission may censure, suspend, or dismiss, or institute proceedings for the suspension or dismissal of, any Commission employee who knowingly and willfully violates the foregoing prohibitions or requirements.

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5. CALIFORNIA CONSTITUTION

Art. XII § 22

Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall

charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpenas and all necessary process and send for persons and papers; and the commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt *in the same manner and to the same extent as courts of record;* the commission may prescribe a uniform system of accounts to be kept by all railroad and other transportation companies.

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6. CALIFORNIA PUBLIC UTILITIES CODE

§ 312. Issuance and service of process: Fees

The commission and each commissioner may issue writs of summons, subpenas, warrants of attachment, warrants of commitment, and all necessary process in proceedings for contempt, in like manner and to the same extent as courts of record. The process issued by the commission or any commissioner, extends to all parts of the State and may be served by any person authorized to serve process of courts of record, or by any person designated by the commission or a commissioner. The person executing any such process shall receive such compensation as

is allowed by the commission, not to exceed the fees prescribed by law on August 8, 1915, for similar services, and such fees shall be paid in the same manner as provided in this part for payment of the fees of witnesses.

§ 1005:

Issuance of certificate; terms and conditions.

The commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the construction of a portion only of the contemplated street railroad line, plant, or system, or extension thereof, or for the partial exercise only of the right or privilege, and may attach to the exercise of the rights granted by the certificate such terms and conditions, including provisions for the acquisition by the public of the franchise or permit and all rights acquired thereunder and all works constructed or maintained by authority thereof, as in its judgment the public convenience and necessity require; provided, however, upon timely application for a hearing by any person entitled to be heard thereat, the commission, before issuing or refusing to issue the certificate, shall hold a hearing thereon.

§ 1705. Who may appear at hearing: Witnesses: Making and filing of decision; Contents: Service of order: When order effective: Extension of time to comply with order

At the time fixed for any hearing before the commission or a commissioner, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all

necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. The decision shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own force, take effect and become operative 20 days after the service thereof, except as otherwise provided, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order.

§ 1706. Record of proceedings

A complete record of all proceedings and testimony before the commission or any commissioner on any formal hearing shall be taken down by a reporter appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order or decision of the commission, a transcript of such testimony, together with all exhibits or copies thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission, but if the petitioner and the commission stipulate that certain questions alone and a specified portion only of the evidence shall be certified to the Supreme Court for its judgment, such stipulation and the questions

and the evidence therein specified shall constitute the record on review.

§ 1732. Specification of grounds

The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application.

§ 1733. Time for granting or denying application

Any application for a rehearing made 10 days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before the effective date, or the order shall stand suspended until the application is granted or denied. Any application for a rehearing made within less than 10 days before the effective date of the order as to which a rehearing is sought, and not granted within 20 days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application.

§ 1734. Hearing; time for determination

If any application for a rehearing is granted without a suspension of the order involved, the commission shall forthwith proceed to hear the matter with all dispatch and shall determine the matter within 20 days after final submission. If no determination is made within that time, it may be taken by any party to the rehearing that the order involved is affirmed.

§ 1735. Stay

An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof except in such cases and upon such terms as the commission by order directs."

§ 1736. Order of abrogation, change, or modification; effect

If, after such rehearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission is of the opinion that the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change, or modify it. The order or decision abrogating, changing, or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission.

7. CALIFORNIA PUBLIC UTILITIES COMMISSION'S RULES OF PRACTICE AND PROCEDURE

5. (Rule 5) *Verification.* Applications or amendments hereto shall be verified by each applicant. Complaints or amendments thereto shall be verified by at least one complainant. Answers shall be verified by at least one of the defendants filing the same. If the party filing the pleading is a corporation or association, the pleading may be verified by an officer thereof.

Verification may be made before a notary public or by certification or declaration under the penalty of perjury.

6. (Rule 6) *Signature and Verification by Attorney.* Except in transfer proceedings (see Rule 35), the attorney for a party may sign and verify a pleading if such party is absent from the county where the attorney has his office, or from some cause is unable to sign and verify such pleading. When a pleading is signed and verified by the attorney, he shall set forth in the affidavit the reasons why the verification is not made by such party.

7. (Rule 7) *Copies.* Unless otherwise required by the Commission, and except as to complaints (see Rule 11), there shall be filed with the Commission an original and twelve conformed copies of each pleading, or amendment thereof, and the original and twelve copies of each brief or petition for rehearing or petition for leave to intervene.

8. (Rule 8) *Amended Pleadings.* Amendments to pleadings, and amended pleadings, may be filed before hearing, provided they are served upon all known interested parties, filed at least five days before the hear-

ing, and contain a certification of service. Thereafter, pleadings may be amended as permitted, or directed, by the Commission or the presiding officer.

21. (Rule 21). *Common Carrier Certificates.*

Carrier by Vessel, P.U. Code, Secs. 1007-1009

Express Corporation, P.U. Code, Sec. 1010

Freight Forwarder, P.U. Code, Sec. 1010

Passenger Stage Corporation, P.U. Code, Secs. 1031-1036

Highway Common Carrier, P.U. Code, Secs. 1063-1064

Petroleum Irregular Route Carrier, P.U. Code, Secs. 1063-1064, 1067-1069

Cement Carrier, P.U. Code, Secs. 1063-1064, 1067

Passenger Air Carrier, P.U. Code, Secs. 2740-2765

In addition to being drafted to comply with Rules 2 through 8, 15 and 16, applications for certificates under any of the above sections of the Public Utilities Code shall contain the following data, either in the body of the application or in exhibits attached thereto:

(a) The type of service being performed by applicant, a general description thereof, and a reference to the authority under which existing service is performed.

(b) The specific authority requested and the particular statutory provision under which the certificate is requested.

(c) If a carrier of property, a description of specified commodities proposed to be transported, and, if general

commodities with exceptions are proposed to be transported, a statement specifying such exceptions.

(d) The geographical scope of the proposed operation, including the termini and other points proposed to be served, and a concise narrative description of the proposed route.

(e) A map or sketch of the route and points to be served, drawn to suitable indicated scale, and showing present and proposed operation by distinctive coloring or marking.

(f) The names of all common carriers with which the proposed service is likely to compete, and a certification that a copy of the application has been served upon or mailed to each such carrier named. Applications shall also name all other parties to whom copies of the application will be mailed. Applicants shall promptly notify the Commission of such mailing. Applicants shall also mail copies to such additional parties and within such times as may be designated by the Commission.

(g) Applications to inaugurate new passenger stage service shall name any state or local authorities located in the area or areas to be served, upon whom service of said application is hereby required to be made, and shall name any other parties to whom copies of the application will be mailed. Applicants shall also mail copies to such additional parties and within such times as may be designated by the Commission.

(h) A statement of the rates or fares proposed to be charged and rules governing service. Applications for certificates need not contain tariffs, but shall indicate the

level and nature of proposed rates and rules and may refer to tariffs on file with or issued by the Commission.

(i) A statement indicating the frequency of the proposed service. If "on call" service is proposed, the application shall set forth conditions under which such service would be performed.

(j) The kind and approximate number of units of equipment to be employed in the proposed service.

(k) A statement of financial ability to render the proposed service.

(l) Fact showing that the proposed operation is required by public convenience and necessity.

49. (Rule 49) *Prehearing Conference.* A presiding officer may hold a prehearing conference for the purposes of formulating or simplifying the issues, arranging for the exchange of proposed exhibits or prepared expert testimony, limitation of number of witnesses, and such other matters as may expedite orderly conduct and disposition of the proceeding.

50. (Rule 50) *Facts Disclosed Privileged.* Facts disclosed in prehearing conferences are privileged. Except by agreement, they shall not be used against participating parties, before the Commission or elsewhere, unless proved by evidence other than that employed in disclosing such facts.

Article 14. Hearings.

51. (Rule 51) *Notice.* In complaint or investigation proceedings, the Commission will give notice of hearing at least ten days before such hearing, unless it be found that public necessity requires hearing at an earlier date.

Comparable notice ordinarily will be given when hearings are held in application proceedings.

52. (Rule 52) *Publication of Notice.* In rate increase applications filed by gas, electric, telephone and water utilities, unless specifically exempted or otherwise provided for by the Commission, the applicant, not less than five nor more than thirty days prior to the initial hearing, shall give notice of hearing to entities or persons who may be affected thereby, (1) by posting hearing notice in public places and (2) by publishing notice in a newspaper, or newspapers of general circulation in the area or areas concerned, of the time, date and place of such hearing. If ordered by the assigned Commissioner or Examiner, applicant shall give notice by bill inserts or by mail to the last known billing address of customers on applicant's records. Proof of such publication and sample copies of the other notices must be filed at or before the hearing.

In other types of applications applicant shall provide such notice to the public as the assigned Commissioner or Examiner may designate for such proceeding. Sample copies of forms of such notices shall be filed at or before the hearing.

53. (Rule 53) *Intervention.* In a complaint proceeding petitions to intervene and become a party thereto shall be in writing, shall set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or opposition to the relief sought. Such a petition shall be served and filed by petitioner at least five days before the proceeding is called for hearing, except

for good cause shown. If petitioner seeks a broadening of the issues and shows that they would not thereby be unduly broadened, the petition shall be served and filed by petitioner at least ten days and the parties may serve and file replies at least five days, before the matter is called for hearing.

Leave will not be granted except on averments which are reasonably pertinent to the issues already presented, but do not unduly broaden them. If leave is granted, the petitioner thereby becomes an intervener and a party to the proceeding to the degree indicated by the order allowing intervention, or by the presiding officer at the hearing.

55. (Rule 55) *Consolidation.* Proceedings involving related questions of law or fact may be consolidated.

56. (Rule 56) *Motion to Dismiss.* A motion to dismiss (other than a motion based upon a lack of jurisdiction) and proceeding before this Commission, which is based upon the pleadings or any matter occurring before the first day of hearing may only be made upon five days' written notice thereof duly filed and served upon all parties to the proceeding and all other parties upon whom service of copies of the pleadings are therein shown to have been made.

57. (Rule 57) *Order of Procedure.* In hearings on complaints, applications and petitions, the complainant, applicant, or petitioner shall open and close.

In hearings on investigation proceedings where filed rates or rules which do not result in an increase have been suspended, the respondent shall open and close. In

other investigation proceedings, the Commission's staff shall open and close. Interveners shall follow the parties in whose behalf the intervention is made. The presiding officer, where circumstances warrant, may vary the order of presentation.

Article 15. Subpoenas.

59. (Rule 59) *Requests for Subpoenas.* Requests for the issuance of subpoenas, requiring the attendance of a witness for the purpose of taking oral testimony before the Commission, shall be in writing and may be made by letter or wire.

60. (Rule 60) *Subpoenas Duces Tecum.* Requests for the issuance of subpoenas for the production of documents or records shall be in writing and shall be accompanied by an affidavit specifying the particular document or record, or part thereof, desired to be produced, stating the reasons why the production thereof is believed to be material and relevant to the issues involved.

61. (Rule 61) *Who May Issue.* Subpoenas may be issued by the Commission, a Commissioner, an Examiner, the Secretary, or an Assistant Secretary. No subpoenas shall issue unless applicant therefor establishes that he has a proper relation to the matter, and gives the name and address of the desired witness. Signed and sealed blank subpoenas will not be issued to anyone. The name and address of the witness shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. Subpoenas shall show at whose instance the subpoena is issued.

Article 16. Presiding Officers.

62. (Rule 62) *Designation.* When evidence is to be taken in a proceeding before the Commission, one or more of the Commissioners or an Examiner, may preside at the hearing.

Article 17. Evidence.

64. (Rule 64) *Form and Admissibility.* Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved.

65. (Rule 65) *Rulings.* The presiding officer shall rule on the admissibility of all evidence. Such rulings may be reviewed by the Commission in determining the matter on its merits. In extraordinary circumstances, where prompt decision by the Commission is necessary to promote substantial justice, the presiding officer may refer the matter to the Commission for determination.

66. (Rule 66) *Objections and Exceptions.* When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

67. (Rule 67) *Offer of Proof.* An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained.

68. (Rule 68) *Prepared Testimony.* With the approval of the presiding officer, a witness may read into the record his testimony on direct examination. Before any prepared testimony is read, unless excused by the pre-

siding officer, the witness shall deliver copies thereof to the presiding officer, the reporter, and all counsel or parties. Admissibility shall be subject to the rules governing oral testimony. If the presiding officer deems that substantial saving in time will result, and where the parties so agree, prepared testimony may be identified and accepted as an exhibit or copied into the record without reading, provided that copies thereof shall have been served upon all parties and the Commission ten days before the hearing or such prior service is waived.

69. (Rule 69) *Documentary Evidence.* If relevant and material matter offered in evidence is embraced in a document containing other matter, the party offering it shall designate specifically the matter so offered. If other matter in the document would unnecessarily encumber the record, the document will not be received in evidence, but at the discretion of the presiding officer, the relevant and material matter may be read into the record or copies thereof received as an exhibit. Other parties shall be afforded oportunity to examine the document, and to offer in evidence other portions thereof believed material and relevant.

70. (Rule 70) *Exhibits.* Exhibits shall be legible and either prepared on paper not exceeding 8½ x 13 inches in size, or bound or folded to that approximate size. Wherever practicable, the sheets of each exhibit should be numbered, and rate comparisons and other figures shall be set forth in tabular form. Copies of exhibits must be clear and permanently legible.

71. (Rule 71) *Copies.* When exhibits are offered in evidence, the original shall be furnished to the presiding

officer and a copy to the reporter and to each party, unless the presiding officer directs otherwise.

72. (Rule 72) *Commission Records.* If any matter contained in a document on file as a public record with the Commission is offered in evidence, unless directed otherwise by the presiding officer, such document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of such document are specifically indentified and are competent, relevant and material. If testimony in proceedings other than the one being heard is offered in evidence, a copy thereof shall be presented as an exhibit, unless otherwise ordered by the presiding officer.

73. (Rule 73) *Official Notice of Facts.* Official notice may be taken of such matters as may be judically noticed by the courts of the State of California.

74. (Rule 74) *Additional Evidence.* At the hearing, the presiding officer may require the production of further evidence upon any issue. Upon agreement of the parties, he may authorize the filing of specific documentary evidence as a part of the record within a fixed time after submission, reserving exhibits numbers therefor.

Article 19. Decisions and Proposed Reports.

77. (Rule 77). *Issuance of Decisions.* A proceeding shall stand submitted for decision by the Commission after the taking of evidence, and the filing of such briefs or the presentation of such oral argument as may have been prescribed by the Commission or the presiding officer.

78. (Rule 78) *Petition for Proposed Report.* A party to a proceeding may file a petition requesting that

a proposed report be issued by the presiding officer. Such petition shall be filed and called to the attention of the presiding officer before the conclusion of the hearing. The original and twelve copies of the petition shall be filed with the Commission, and the original shall show that copies have been served upon all parties to the proceeding. The petition shall set forth the reasons why it is believed that issuance of such a proposed report will promote the administration of justice and will not cause unreasonable delay in the final determination of the proceeding. Objections may be served and filed by other parties within five days after service of the petition.

79. (Rule 79) *Proposed Reports.* Upon direction by the Commission, the presiding officer shall prepare and file his proposed report. The Secretary's office shall cause copies thereof to be served upon all parties to the proceeding. Such proposed report shall contain recommended findings, conclusions, and order.

80. (Rule 80) *Exceptions.* A party may serve and file exceptions to a proposed report within twenty days after service thereof. Exceptions shall be specific, and stated and numbered separately. Exceptions to factual findings shall specify the portions of the record relied upon; proposed substitute findings; and proposed additional findings, with supporting reasons. Exceptions to conclusions shall cite statutory provisions or principal authorities relied upon; proposed substitute conclusions; and proposed additional conclusions.

81. (Rule 81) *Replies to Exceptions.* Replies may be served and filed within fifteen days after service of exceptions.

82. (Rule 82) *Service of Orders.* Decisions and orders shall be served by the Secretary's office by mailing copies thereof to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a copy thereof. When a party to an application proceeding has appeared by a representative, service upon such representative shall be deemed to be service upon the party.

83. (Rule 83) *Effective Date.* Decisions and orders in complaint or investigation proceedings shall become effective twenty days after service thereof, unless otherwise provided therein. Decisions and orders in other proceedings shall become effective twenty days after issuance thereof, unless otherwise provided therein.

Article 20. Reopening Proceedings.

84. (Rule 84) *Petition to Set Aside Submission.* After conclusion of hearings, but before issuance of a decision, a party to the proceeding may serve on all other parties, and file with the Commission, a petition to set aside submission and reopen the proceeding for the taking of additional evidence. Such petition shall specify the facts claimed to constitute grounds in justification thereof, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. It shall contain a brief statement of proposed additional evidence, and explain why such evidence was not previously adduced.

Article 21. Rehearings.

85. (Rule 85) *Petitions for Rehearing.* Petitions for rehearing of an order or a decision shall be served upon

all parties and should be filed before the effective date thereof, or, if the Commission has fixed a date earlier than the 10th day after issuance as the effective date of the order or decision, then before the 10th day after the date of issuance. (See P.U. Code, Sec. 1731.) Petitions shall set forth specifically the grounds on which petitioner considers the order to be unlawful or erroneous.

86. (Rule 86) *Effect of Filing.* Mere filing of a petition for rehearing shall not excuse compliance with a decision. A petition filed ten or more days before but not granted or denied before the effective date of an order suspends the order until the petition is granted or denied. (See P.U. Code, Sec. 1733.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-92

(PREVIOUSLY OCTOBER TERM, 1970, No. 1419)

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners,*

vs.

TRUCKING UNLIMITED, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

PRELIMINARY STATEMENT

This reply brief deals under the first two heads with the two main contentions made by plaintiffs in their brief (Brief of Respondents). Under a separate third head defendants point out the essential need for antitrust immunity in an area, as in the present case, where the intervention of competitive interests is encouraged by statute and regulated by administrative rules and procedure to serve a valid governmental purpose.

I. THE PROTECTION OF NOERR-PENNINGTON APPLIES EVEN WHEN THE JOINT EFFORT TO INFLUENCE GOVERNMENTAL ACTION RESPECTING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY IS ACCOMPANIED, IN ADDITION TO ANTI-COMPETITIVE PURPOSE, BY A PURPOSE TO DETER WOULD-BE APPLICANTS FROM PROCEEDING WITH THEIR APPLICATIONS.

Plaintiffs argue that *Noerr-Pennington*[1] immunity does not apply when the joint effort to influence governmental action respecting certification is accompanied, in addition to anticompetitive purpose, by a purpose to deter would-be applicants from going forward with their applications.

This contention flies directly in the face of *Noerr-Pennington* which holds that when the efforts to influence governmental officials are genuine, intent or purpose is immaterial. As Mr. Justice White said in *Pennington* (381 U.S. at 670):

> "Noerr shields from the Sherman Act a concerted effort to influence public officials *regardless of intent or purpose.*" (Emphasis added.)

This holding makes no exceptions. Its strength and force are unequivocal. It applies even when the purpose and intent is "to hurt the truckers [competition] in every way possible", and even when such purpose is successful, and actual economic injury results. The intent in *Noerr* was (365 U.S. 142):

> ". . . *'to hurt the truckers in every way possible even though they secured no legislation'.* (Emphasis in original.) Specifically the District Court found that the purpose of the railroads was to destroy the goodwill of the truckers among the public generally and among

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[1] *Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

> the truckers' customers particularly . . . and that the railroads were successful in these efforts to the extent that such injury was actually inflicted".

To circumvent the unequivocal holding of *Noerr-Pennington* that intent is immaterial when the efforts to influence governmental officials are genuine, plaintiffs declare that such efforts cannot be genuine when the "real" purpose is to deter would-be applicants from going forward. They say that in such case the joint effort to influence governmental bodies is "sham" and falls within the "sham" dictum of *Noerr* (365 U.S. at 144). Such reasoning is circuitous and assigns to "sham" a meaning altogether different from that expressly stated in *Noerr*.

The "sham" dictum in *Noerr* (365 U.S. at 144) reads as follows:

> "There may be situations in which a *publicity campaign, ostensibly directed toward influencing governmental action,* is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denied that the railroads were making *a genuine effort to influence legislation and law enforcement practices.*" (Emphasis added.)

In effect the Court said, given a genuine intent to influence governmental action—genuine in the sense that a genuine effort is made to persuade governmental officials to take certain action which they are authorized to take—there is no sham regardless of whatever other intents or purposes may be present.

Awareness by would-be applicants that in any certificate proceeding the governmental body will have before it not only applicant's presentation but that of protestants, inevitably has a deterrent effect on such applicants. They will think twice before marching blithely in and expecting a certificate as a matter of course. Plaintiffs say that whenever defendants intend such deterrent result their joint efforts to influence governmental action are not "genuine" and constitute a "blocking" and are a "sham", and that antitrust laws make such joint efforts unlawful.

The circuity of such reasoning was recognized in *Noerr* and rejected. Just as in the present case defendants would know that their joint efforts would have a deterring effect, so in the *Noerr* case the railroads knew their activities to influence governmental action would inflict injury on the truckers. In *Noerr* the Court said that such knowing and intended infliction of injury *must not* be allowed to stand in the way of joint appeals to governmental agencies, so long as the effort to influence governmental action is genuine in the sense that a genuine effort is made to persuade governmental officials to take certain action. Thus we read at 365 U.S. at 144:

> "To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns".

The present case is even stronger than *Noerr* for the proposition that intent should be immaterial, once it is admitted as in the present case that the efforts to influence governmental action were genuine in the sense that defendants made a genuine effort to persuade governmental officials to refuse further certification. There is no such

thing as a legal right to receive a certificate without benefit of hearing and without intervention of protestants. On the contrary, the Interstate Commerce Act and the California Public Utilities Code, as well as the rules promulgated by the respective commissions, encourage existing carriers to come in and protest. The resulting deterring effect is part of the legal process. The knowing and intended destruction of goodwill in *Noerr* did constitute the infliction of injury; the knowing and intended deterring effect arising from the publicizing and implementing of a program by a group of existing carriers to accept the statutory invitation to make their views known is not the infliction of injury but the imposition of the burdens which go with the certificating process.

Throughout consideration of the issues in the present case it must be remembered that there is no allegation that the presentations of defendants were dishonest; there is no allegation that false information was furnished; there is no allegation that the information was irrelevant; and there is no allegation that the administrative agencies were rendered powerless to restrict the presentations of defendants in any way deemed necessary.

The plaintiffs argue that an antitrust conspiracy is beyond the competency and expertise of the ICC and PUC. Whether this is true or not is immaterial. The material point is that the effort to influence governmental action was genuine in the sense of seeking to influence governmental action effectively, and that the agencies were not prevented from exercising their processes and from making independent decisions on the merits. Plaintiffs have admitted in their briefing that the opposition to plaintiffs'

applications was as effective as defendants could make it. Brief for Respondents, pp. 6, 7. Moreover, the complaint makes no allegation that the governmental bodies were prevented from exercising full control over their procedures and their independent determination of the merits.

Plaintiffs argue that the complaint raises a factual issue as to intent which needs to be resolved. This is simply not so. Since plaintiffs have conceded that the effort to influence governmental bodies was genuine in the sense that a genuine effort was made to persuade governmental officials to take certain actions, the issue of intent relating to sham is resolved, and *Noerr-Pennington* holds that in such case there is no other issue of intent which is relevant.

II. THE NOERR-PENNINGTON IMMUNITY DOES NOT DEPEND UPON WHETHER THE GOVERNMENTAL ACTION BE "ADJUDICATION" BUT RATHER UPON BROADER CONSIDERATIONS, INCLUDING THE NEED OF GOVERNMENT TO BE INFORMED.

In their striving to find a way out of the *Noerr-Pennington* immunity plaintiffs have spun a concept that *Noerr-Pennington* does not immunize joint efforts to influence governmental officials involved in "adjudication", and that governmental action respecting certification is "adjudication".

Plaintiffs use the term "adjudication" in two ways. They say that if the trappings of court procedure are present, the work of the governmental body is "adjudi-

catory". A good deal of effort has been spent by them to point out that the ICC and PUC use the procedural techniques of courts. They next assert that the work of the ICC and PUC in acting upon applications or transfers of certificates is "adjudicatory" in a substantive sense.

There is no practical justification for drawing a line between "adjudication" and "non-adjudication" for purposes of determining whether the *Noerr-Pennington* immunity applies. If one looks instead to the reasoning of the Court in *Noerr,* one finds that the issue is whether the area in which joint efforts to influence governmental officials is involved requires the free flow of information from competitors to enable those officials to carry out their task effectively. In the area of certification there is congressional and legislative recognition that it is desirable to encourage existing certificated carriers to offer evidence in opposition to the issuance of new certificates, and the respective agencies have promulgated rules which effectively control such activity.

Plaintiffs place great reliance upon certain cases involving antitrust liability for misuses of patent rights.[2] The Ninth Circuit felt those cases, together with *Slick Airways, Inc. v. American Airlines, Inc.,* 107 F.Supp. 199 (D.C. N.J. 1951) *appeal dismissed* 204 F.2d 230 (3d. Cir. 1953), "demonstrate that litigation can be an integral part of a

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[2] *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172 (1965); *United States v. Singer Manufacturing Co.,* 374 U.S. 174 (1963); *Clapper v. Original Tractor Cab Co.,* 270 F.2d 616 (7th Cir. 1959), *cert. denied,* 361 U.S. 967 (1960); *Kobe, Inc. v. Dempsey Pump Co.,* 198 F.2d 416 (10th Cir.) (1952) *cert. denied,* 344 U.S. 837 (1952); *Lynch v. Magnavox Co.,* 94 F.2d 883 (9th Cir. 1938); *United States v. Krasnov,* 143 F.Supp. 184 (E.D. Pa. 1956), affirmed, 355 U.S. 5 (1957).

scheme prohibited by the Sherman Act." Jt.App. p. 53. The teaching of these cases should not be allowed to impair the intended sweep of the *Noerr-Pennington* immunity. If there is conflict between the patent cases and the *Noerr-Pennington* doctrine, it should be resolved in a manner different from that chosen by the Ninth Circuit majority; if the rule developed and simplistically applied below by such majority is upheld, the result will be a far-reaching adverse effect on the proper operation of administrative agencies, availability of the courts to vindicate private and public rights, and the First Amendment right to petition. Defendants will hereinbelow demonstrate that the patent cases do not require such a result.

A. The patent cases relied on by plaintiffs must be put in context.

The patent laws of the United States constitute a legislative exception to the more general public policy against monopolies in that they provide for grant to private parties of a "statutory monopoly". *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964). The exception thus created, however, is strictly limited to avoid frustration both of the policy behind the patent laws themselves[3] and the more general prohibition of unreasonable restraint on trade. See *Mercoid Corp. v. Mid-Continent Invest. Co.*, 320 U.S. 661 (1944) at 664-666; *Sears, Roebuck & Co. v. Stiffel Co., supra,* 229-231; Report of the Attorney General's Na-

[3]Patents are meant to encourage invention, by rewarding those investing time and capital in their development, and to encourage early disclosure and availability of the inventions. Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) 224-225.

tional Committee to Study the Antitrust Laws (1955) 225.

The federal courts have frequently been called upon to define the limits of the patent monopoly, especially in the light of the antitrust laws, and examination of the resulting body of law makes evident that patents lend themselves to a variety of abusive practices illegal under the latter statutes. Thus, exercise of purported but actually illusory rights under a patent obtained by knowing fraud on the Patent Office;[4] acquisition of numerous patents by purchase from others with a purpose of acquiring monopoly power;[5] acquisition of patent rights by "grant back";[6] deliberate non-exercise of a patent's teaching pursuant to horizontal agreement[7] or with purpose to monopolize;[8] extension of the patent's monopoly by licensing practices such as requiring royalties on sale of similar but unpatented products[9] or on ancillary "tied" products,[10] imposition of restraints on resale of patented products[11] imposition of restraints in use or sale outside the ter-

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[4]*Walker Process, Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

[5]E.g., *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948).

[6]E.g., *United States v. General Electric Co.*, 82 F.Supp. 753, 815-816 (D.N.J. 1949).

[7]E.g., *Hartford Empire Co. v. United States*, 323 U.S. 386, 431 (1945).

[8]E.g., *United States v. Aluminum Co. of America*, 91 F.Supp. 333, 386 (S.D.N.Y. 1950).

[9]*United States v. United States Gypsum Co., supra* at 384-385.

[10]E.g., *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936); *International Salt Co., Inc. v. United States*, 332 U.S. 392, 396 (1947).

[11]See *United States v. General Electric Co.*, 272 U.S. 476 (1926), at 489 (fixing resale price is illegal); *Adams v. Burke*, 17 Wall. 453 (U.S. 1873) (territorial restraints on resale are illegal).

ritorial extent of a patent,[12] restraint of a licensee's power to make and sell competitive products,[13] "package" licensing where license of one or more patents is "tied" to acceptance of license under others;[14] use of multiple patent licenses to effect a horizontal scheme of price-fixing;[15] and cross-licensing and "interchange" or "pooling" with a purpose to monopolize or unreasonably restrain competition[16] all have been held, either for themselves or as part of a wider pattern of anticompetitive conduct, violative of the antitrust laws.

The cases arising in the patent area relied on by plaintiffs and the Court of Appeals majority cannot be viewed in isolation; they are an integral part of this large corpus of precedent and are understandable only in its context; indeed, *they all are explained and justified under one or another of the rubrics of illegal abuse of patent rights above listed.*

B. The patent cases do not establish an antitrust cause of action based on litigation as such even if brought with intent to restrain competition.

When a patentee brings suit against another based on unauthorized use of the teaching of his patent by the one sued, he is utilizing his lawful, and his chief, means of protecting the property right represented by his patent.

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[12] *United States v. National Lead Co.*, 332 U.S. 319 (1947).

[13] *McCullough v. Kammerer Corp.*, 166 F.2d 759 (9th Cir. 1948).

[14] E.g., *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940).

[15] E.g., *United States v. Line Material Co.*, 333 U.S. 287, 293 (1948).

[16] *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952); *United States v. General Instrument Corp.*, 115 F.Supp. 582 (D.C.N.J. 1953).

Infringement suits are the usual means of enforcing patent rights. See Report of Attorney General's National Committee to Study the Antitrust Laws, *supra,* at 247. As the District Court in this case recognized, "the mere bringing of a patent infringement suit, even if alleged to have been brought maliciously and with a purpose of monopolizing an industry, does not state a violation of Section 2 of the Sherman Act" (Jt.App. p. 42), citing *International Visable Systems v. Remington Rand,* 65 F.2d 540 (6th Cir. 1933) at 542. It is obvious, moreover, that the motive of such suits will *always* be the private and commercial one of maintenance or restoration of competitive advantage. Without an underlying abuse of the patent right itself, however, resort to infringement litigation even if carried on as a conscious policy of vigorous and frequent suits, is not a patent misuse or an antitrust law violation. *Cole v. Hughes Tool Co.,* 215 F.2d 924, 935 (10th Cir. 1954) *cert. den.* 348 U.S. 927, *reh. den.* 348 U.S. 965 (1955); *Dollac Corp. v. Margon Corp.,* 164 F.Supp. 41 (D.C. N.J. 1958) *aff'd on other grnds.,* 275 F.2d 202 (3d Cir. 1960); see also *United States v. United Shoe Machinery Corp.,* 110 F.Supp. 295 (D. Mass. 1953) at 333, *aff'd per curiam* 347 U.S. 521 (1954).

The patent cases cited by plaintiffs all involved other factors, of themselves illegal, where the infringement litigation served as an effectuating tool or evidence of the underlying wrong.

Thus, in *United States v. Singer Manufacturing Co.,* 374 U.S. 174 (1963), this Court held illegal a horizontal combination of three corporations (a) to withdraw oppositions to one another's application before the Patent

Office, (b) to cross-license, and (c) to assign patents to the member of the conspiracy who could most effectively sue other competitors of the conspirators. The wrong claimed by the plaintiff and found by the Court was "the concerted action to restrain trade" by protecting all three conspirators against Japanese competitors through exchange of patent rights and related behavior. 374 U.S. at 189, 194-195.

Kobe v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952) involved purposeful acquisition of a monopoly position by purchase and pooling of patents, as well as extensive direct communications by the patentee to the alleged infringer's customers, as did *Lynch v. Magnavox*, 94 F.2d 883 (9th Cir. 1938).

In *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172 (1965), the patent on which the infringement action was brought had been obtained by a knowing fraud on the Patent Office. The antitrust abuses there involved included the original fraud in procurement of the patent, enjoyment thereafter by the erstwhile patentee of an apparently lawful but ill-gotten and actually unlawful monopoly, and use of patent infringement warnings to customers as well as the infringement action.

Other cases relied on by plaintiffs also involved antitrust violations distinct from mere institution of infringement suits.[17]

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[17] *United States v. Krasnov*, 143 F.Supp. 184 (E.D. Pa. 1956) (exclusive patent pool); *United States v. Hartford Empire Co.*, 46 F.Supp. 541 (N.D. Ohio 1942) *aff'd* 323 U.S. 386 (1944) (exclusive pooling and purposeful acquisition of a monopoly patent position); *Stewart-Warner Corp. v. Staley*, 42 F.Supp. 140 (W.D.

The sum of the wrongs complained of in plaintiffs' First Amended Complaint is that defendants combined to adopt, make known and carry out a plan of protesting all applications before the PUC and ICC for new trucking certificates, or for transfer of certificates, or registration of intrastate applications with the ICC and sought rehearing or appealed decisions adverse to their protests by the agencies, all for the purpose of reducing or eliminating competition, and *no more*. No allegation of irregular or improper procedure, misrepresentation or the like is made. No allegation is made of other anticompetitive activity, or of agreement by defendants not to oppose

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Pa. 1941) (purposeful acquisition of numerous patents with monopolistic motive, public assertions of scope of patent rights beyond those really held, secret agreements with defendants in infringement suits to allow them to go to judgment for patentee and subsequent publication of such cases as precedent); *Clapper v. Original Tractor Cab Co.*, 270 F.2d 616 (7th Cir. 1959) (patentees were parties to concededly illegal cross-licensing agreement). Many of the cases explicitly note that bringing of litigation, *without more*, would not be unlawful. *Kobe, supra; Stewart-Warner Corp., supra.*

In addition to cases cited by plaintiffs, infringement litigation has been involved in numerous other cases where patentees have been found to have violated the antitrust laws. E.g., *Mercoid Corp. v. Mid-Continent Invest. Co., supra.* Some cases find patentees liable where the infringement suits they have brought are really sham. E.g., *International Industries and Developments v. Farback Chemical Co.*, 145 F.Supp. 34 (S.D. Ohio 1956), Cf., *Maytag Co. v. Meadows Mfg. Co.*, 35 F.2d 403 (7th Cir. 1929) (suit brought on "passing off" theory was a sham whose real purpose was to create bad publicity and hurt competitor's business; such publicity deliberately misrepresented that patent infringement existed). *Lynch v. Magnavox, supra,* also involved bringing "sham" infringement suits. Even under *Noerr* "sham" resort to government is illegal where the only purpose is the imposition of harm by the ancillary side effects of such action and this lack of bona fide purpose is objectively demonstrable in that there is no real effort to influence government, or possibility of obtaining the government action sought.

each other's applications to the agencies.[18] There is no allegation that the agencies were precluded from exercising their jurisdictions or functions, that all plaintiffs' applications were meritorious or all defendants' protests unmeritorious. The First Amended Complaint presents the narrow issue whether combination on a continuing basis, not secret but made known to the trade, to intervene in all trucking certificate proceedings of the PUC and ICC, *without more,* violates the antitrust laws. *None* of the cases relied on by plaintiffs holding patent abuses involving litigation illegal presents a remotely similar factual situation to that here alleged.

It is true, as plaintiffs point out in their Brief at pp. 63-64, that this Court held in *Pennington* that:

> "Joint efforts to influence public officials . . . (are) not illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670.

It is possible to argue from this, as plaintiffs indeed do argue, that the *Noerr-Pennington* doctrine cannot apply to patent litigation, because otherwise the *Singer, Kobe* and similar holdings would be nullified. But plaintiffs

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[18]Plaintiffs now seek to allege, for the first time, that defendants agreed to forebear seeking new authority themselves. Respondents' Brief, footnote 9, pp. 45-46. Yet, as Judge Sweigert recognized in his opinion below, the complaint "does not charge acts in restraint of trade or attempts at monopoly *except* in the one respect that defendants associated for the purpose of intervening in regulatory proceedings to oppose *plaintiff's* applications". Jt.App., p. 25 (emphasis added). And plaintiffs' failure to move for leave further to amend their complaint below must be taken as accepting the learned District Judge's characterization of their allegations in this respect. Moreover plaintiffs could not truthfully make an allegation of forbearance. See Brief for Petitioners, p. 14, footnote 4.

are forced to carry their argument a step further: they argue that the patent cases show *Noerr* and *Pennington* do not apply to *any* litigation, and not only to any litigation, but to any "adjudicative" proceeding.

None of the patent cases relied on by plaintiffs, however, consider at all the question of *Noerr,* and conversely neither *Noerr* nor *Pennington* considers the patent cases. *Singer* was decided after *Noerr* but before *Pennington.* Defendants submit that, in the appropriate case, this Court may wish to clarify the relationship of the rule in *Singer* with that in *Pennington.*[19] The instant case, however, does not require so much. It involves neither patents, nor any broader scheme beyond the agreement to protest. It does not even involve litigation, except in the form of appeals from regulatory decisions.

Plaintiffs on Brief herein place particularly great weight on *Walker Process,* the only case in the patent litigation area decided after *Pennington.* Yet analysis of this decision makes particularly evident how inappropriate antitrust rules developed in the patent area would be if applied in the context of trucking certification proceedings before the PUC or ICC. It is untrue to state, as plaintiffs do, that *Walker Process* involved *only* misuse of process

[19] A distinction between the two rules need not be based, indeed *should* not be based, on whether an adjudicative process is involved. Defendants suggest that the distinction might be drawn based on whether the appeal to government was an integral and necessary part of the broader illegal scheme, as it will always be in the *patent* area, or whether it was potentially independent activity of conspirators *also* engaged in other, illegal activities, as would appear to have been the case in *Pennington.* Naturally where the *only* goal of the appeal is harassment, without reasonable hope of obtaining governmental action, the *sham* exception to *Noerr* is always available.

by bringing of litigation without probable cause, although the latter element is clearly very important. Note that the *single* antitrust defendant in *Walker Process knowingly* initiated litigation to enforce rights which were *clearly* invalid as a matter of law—clearly invalid because obtained by the earlier wrong of *knowing* fraud on the Patent Office. Try to apply the same test to a single certificated carrier faced with the problem of whether or not to enter, as a protestant, a certificate application proceeding initiated by another. Is it necessary for antitrust liability that the protestant's certificate be invalid and that he know it? Presumably plaintiffs would answer in the negative, yet the invalidity of the patent in *Walker Process* was central to the Court's holding. When is there "probable cause" that public convenience and necessity would or would not be served by further competition? Reference to defendants' discussion on Brief, pp. 30-41, and authorites there cited, should demonstrate that the question could almost never be answered with the clarity which was possible in *Walker Process,* because the *certification proceeding involves policy-making* by an agency *exercising legislative power and wide discretion.* The question should not even be *relevant* since the right to intervene in certification proceedings, unlike initiation of suit based on a cause of action for patent infringement, does not depend upon the existence of a substantive cause of action but arises from the agency's desire and need for such participation. See Petitioners' Brief pp. 41-46, and authorities there cited. The scheme of regulation would be frustrated if would-be protestants had first to weigh the likelihood of success in their protest against potential antitrust liability. Just as in *Noerr,* the exposure to anti-

trust liability for participation in regulatory proceedings would frustrate the legislative scheme and the proper functioning of the agencies involved. The same considerations just do not apply as in patent litigation, where as will be discussed further below, antitrust sanctions are virtually the *only* available regulation.

C. The resort to governmental agencies in certificate proceedings serves a different purpose than in patent litigation.

The restraint upon competition in the certification field involves factors wholly distinct from those in the patent field. The means involved in establishing a valid restraint is altogether different in each case, and the end to be served is likewise altogether different. Indeed, the differences are so great as to make the patent cases simply irrelevant.

Certificate proceedings before the ICC and PUC do not involve the same concept of "property" as in the patent cases. A certificate is merely a license to operate in certain ways in a given area, and the agencies are free to grant as many similar certificates as they deem fit under the statutory standard of "public convenience and necessity." See Petitioners' Brief herein, pp. 34-41. Moreover, a certificate may be transferred only if found to be not adverse to the public interest. Right of entry into the market, business practices, rates and many other facets of motor carrier operations are subject to rule and agency scrutiny. The function the agency exercises is a limited delegation of the legislative power involving broad discretion, and it is allowed by the standard of "public convenience and necessity" to consider all relevant factual, legal and economic considerations, including those rele-

vant to whether increased competition would benefit or harm the public interest. See Petitioners' Brief, pp. 41-44. That the proceedings in such cases are, for certain purposes, to be described as "adjudicative"[20] is no shibboleth on which to deny application of the *Noerr* rule, since it is clear that even litigation in the courts may involve the exercise of important political rights. *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963).[21] In their protests before the PUC and ICC defendants were exercising their right, provided for by statute and agency rule, to participate in adversary hearings on applications. Their participation is contemplated by those statutes and rules and is essential to the effective operation of the system of governmental regulation involved.

The patent cases involve completely different considerations. Patentees and the persons they may sue as infringers may be and usually are operating in industries otherwise unregulated in any manner comparable to that for certificated motor carriers. If the courts did not have

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[20]See the Court of Appeals opinion below, footnote 4, Jt.App. p. 50.

[21]See also *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217 (1967); *United Transportation Union v. State Bar of Michigan,* ..... U.S. ..... 28 L.Ed.2d 339 (1971). In this connection the significance of the arguments made on brief herein by *amici curiae* Landmarks Holding Corporation, et al. should not be missed. While defendants naturally contest the conclusions urged on this Court in that brief, they agree that the question whether the proceeding is adjudicative is an impossible standard: "The nature of the governmental body is not alone the decisive factor, which is perhaps just as well since there are many governmental bodies whose 'nature' on the representative-adjudicative continuum it would be difficult to state with confidence." Amici's Brief at 31. Amici in fact tactfully but clearly reject the Ninth Circuit's *ratio decidendi* and urge upon this Court a different, multi-factor test for applying the *Noerr* rule.

available the doctrinal tools of patent misuse and antitrust law to protect the public interest, the courts would have no discretion but to allow the actions to be brought and to award relief where infringement is shown, regardless of any broader policy considerations. When this fact is coupled with the peculiar tension between the patent laws and general antitrust policies, and with the fact that patent infringement is *the* major tool for protecting a patent monopoly, it becomes evident that the patent cases involve very special considerations, not present in this case, and should not govern the result here.

III. QUITE ASIDE FROM THE QUESTION WHETHER THE NOERR-PENNINGTON IMMUNITY APPLIES, CONGRESS AND THE CALIFORNIA LEGISLATURE HAVE EACH CREATED A SCHEME FOR OBTAINING RELEVANT INFORMATION RESPECTING PUBLIC CONVENIENCE AND NECESSITY WHICH ENCOURAGES EXISTING CARRIERS TO PROTEST TO WHATEVER EXTENT POSSIBLE AND WHICH SHOULD CARRY ANTITRUST IMMUNITY, ESPECIALLY SINCE ANY RESULTING RESTRICTION UPON COMPETITION IS NOT THE ACT OF PROTESTANTS BUT OF GOVERNMENT.

Plaintiffs argue that this Court intended to restrict the scope of *Noerr-Pennington* to joint approaches in the nature of lobbying, and that *Noerr-Pennington* does not provide immunity if the joint approach is in the medium of judicial or quasi-judicial procedures or if the governmental body in question is acting in an "adjudicatory capacity" within the framework of a legislative standard, however broad that standard might be.

While the defendants believe such argument legalistic rather than responsive to the reasons assigned by the

Court in *Noerr* for interpreting the Sherman Act as not extending to joint appeals to government, it is perhaps academic to dwell upon the issue whether *Noerr-Pennington* as such does or does not extend generally to joint appeals to administrative agencies and the courts on review. Defendants submit that where the regulatory scheme created by Congress and the California legislature respecting certificates of public convenience and necessity provides for and encourages the fullest intervention of competitors so that governmental officials may obtain evidence not otherwise conveniently available to assist them in the formulation of their decisions, it would be erroneous to find that Congress intended the Sherman Act to apply to such interventions. It would be erroneous since, as in *Noerr,* such activity is essentially dissimilar from the trade-restriction activity contemplated by Congress. It would be erroneous since, as in *Noerr,* there is a need for government to be informed, indeed a legislatively recognized need to be informed in the very way being challenged as a violation of the antitrust laws. It would be erroneous because the legislative scheme to encourage competitors to intervene would be defeated if competitors would have to fear antitrust liability if they did come forward to protest. It would be erroneous because of the resulting jeopardy to First Amendment rights.

In addition to the above reasons there is another compelling one, viz., that the *only* restriction upon competition resulting from defendants' protests is the act of *government,* not of defendants, and antitrust immunity applies under the teaching of *Parker v. Brown,* 317 U.S. 341 (1943).

To put this whole problem in proper perspective one must recognize that the only restriction which defendants by their alleged conduct can achieve on their own is a deterrence upon applicants, arising from the awareness of applicants that they cannot obtain a certificate without proving up and meeting whatever evidence defendants may present against the issuance of a new certificate. Such deterrence is simply part of the legal process. Whatever expense and effort is forced upon applicants to meet the fullest challenge on the merits mounted by the opposition is exactly what is contemplated by the regulatory process. In this special context there is nothing illegal or improper in joint financing and joint use of common counsel by the opposition. As noted by dissenting Judge Hamlin of the Court of Appeals, the PUC and ICC have ample power to protect their processes from abuse and can restrict protests to whatever extent they deem desirable.

In providing that opponents to an application for certification may come before the PUC or ICC, whether jointly or singly, both the state and federal schemes harness the self-interest of competitors to achieve the benefits of an adversary hearing on an application. The type of activity asserted by plaintiffs to be in violation of the antitrust laws is justified as a matter of public policy. Insofar as defendants combine to present the case against any application, they enrich the informational and intellectual resources available to the PUC and ICC. Moreover, without such concerted activity, an intelligent determination based on a balanced view of significant factors may be impossible to achieve in the

situation where there is no single certificated carrier with sufficient interest or financial willingness, by itself, to counterbalance the argumentative effort mounted by the applicant who obviously has a vital interest in the outcome of his application, an interest transcending in most cases that of any single carrier protesting. An individual protest is after all a minor role as opposed to the role of the affirmative seeking of certification.

The complaint admits that some certificate applications were denied *only* because of the intervention of defendants. Jt.App. 10. It follows that plaintiffs' argument is reduced to the following proposition: there is a right to seek certification free of protest from any group of truckers publicizing their intent to protest all applications, *even though* the effect is to sacrifice the practical availability to the Commission of information necessary to make an informed determination on the issue of public convenience and necessity. This is a sacrifice for which there is no reasonable justification. The Congressional and legislative intent is to encourage the flow of information from competitors so that sound decisions can be made.

The Court of Appeals majority identified as the anti-competitive effect of defendants' activities that "application by plaintiffs and other competitors for the issuance, transfer, or registration of operating rights were defeated, delayed or restricted . . .". Jt.App.p. 57. But unlike the "sham" exception noted in *Noerr*, such would be the result not because of any extra-governmental or fraudulent or other untoward conduct of defendants. It would be the result of applicant's inability to withstand

challenge in the adversary forum contemplated by the regulatory scheme for the determination of public convenience and necessity.

In the regulatory scheme which invites intervention by certificated protestants, the concept of "probable cause" simply has no place. In both adjudicative and legislative aspects the certification procedures of the ICC and PUC provide a hearing process expressly designed to separate meritorious claims from frivolous. Paradoxically perhaps, the determination of "public convenience and necessity" is best served by defendants' alleged activity in the very situation where plaintiffs suggest it is "sham" activity. When the application presents a strong prima facie case for granting a certificate, it is particularly important in the public interest that competitors come forward to provide opposition and investigation beyond the resources and inclination of the administrative body which might otherwise be prepared to rest upon superficial examination. Defendants submit that the Court of Appeals majority was in error in concluding that the complaint by the use of the term "with or without probable cause" introduces the possibility that the acts of protestants were "sham". Since plaintiffs have conceded that the efforts to persuade the governmental bodies were as effective as protestants could make them, there can be no "sham" in the *Noerr* sense.

CONCLUSION

This case is devoid of any anticompetitive effect which is not a usual and desirable aspect of the governmental regulation of motor carriers. This case involves principles of public policy wholly alien to the patent cases cited by plaintiffs. The activities determined by the Ninth Circuit majority to be in contravention of the antitrust laws serve the same governmental purposes recognized as valid in *Noerr* and *Pennington,* and do so through a regulatory framework designed to render successful such activities only insofar as they serve valid governmental purposes.

Since the First Amended Complaint, if construed to resolve all doubts in favor of plaintiffs, fails to state a cause of action under the federal antitrust laws, the decision of the Ninth Circuit should be reversed and the decision of the federal district court dismissing the complaint should be sustained.

Dated, November 4, 1971.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-92

(PREVIOUSLY OCTOBER TERM, 1970, No. 1419)

CALIFORNIA MOTOR TRANSPORT CO., et al., *Petitioners,*

vs.

TRUCKING UNLIMITED, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

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MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

Petitioners California Motor Transport Co., et al., respectfully move for leave to file a supplemental brief for the purpose of presenting new matter significant to the disposition of the case.

It is the recollection of counsel for petitioners that in answer to a question from the Bench a misstatement of law was made. The question posed was whether a hearing must be held in a certificate application proceeding if a protest is lodged by existing carriers before the Califor-

nia PUC or the ICC. It is the recollection of counsel for petitioners that an affirmative answer was given respecting each commission. Since the law is to the contrary, and since a correct answer may have a vital bearing upon the ultimate disposition of the case, and since that issue was not specifically briefed by either party earlier, petitioners respectfully move that they be allowed to file a supplemental brief in the form attached.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF

I. THE ICC IS NOT REQUIRED TO HOLD A HEARING WHEN EXISTING MOTOR CARRIERS FILE A PROTEST TO AN APLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

When protest is filed to a motor carrier certificate application there is no legal requirement that a hearing be held. Section 205(e) of the Interstate Commerce Act gives the Commission discretion whether or not to hold a hearing, as indicated by the following words:

". . . notice shall be afforded . . . for the purpose of . . . participating in a hearing, if a hearing is held . . ."

In accordance with this language the ICC has promulgated rules under which it may exercise its discretion and in lieu of hearing allow protestants to make their views known in writing. Rule 45 of the General Rules of Practice, 49 CFR 1100.45.

II. THE CALIFORNIA PUC IS NOT REQUIRED TO HOLD A HEARING WHEN EXISTING HIGHWAY CARRIERS FILE A PROTEST TO AN APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

The pertinent provision of the California Public Utilities Code is Section 1064 which is part of Article 4 and relates expressly to highway carriers. Section 1064 provides so far as pertinent:

". . . the commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the partial exercise only of the privilege sought . . ."

This section applies whether protest is filed or not; there is no basis for stating that the filing of a protest removes the discretion lodged in the Commission.* The Commission has in fact denied hearing on occasion despite protest. A protest does not transform the proceeding into a complaint as the term "complaint" is used in the Code.

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*If a hearing *is* held no protest will be considered unless protestant can demonstrate that its contentions will be "reasonably pertinent to the issues". Calif. PUC Rules of Practice and Procedure, Rule 54. To similar effect for the ICC is its Rule 247 (49 C.F.R. §1100.247).

Section 1005 of the California Public Utilities Code upon which respondents' counsel can be expected to rely is not the pertinent section. It does require a hearing when protest is filed, but it applies *only* to the utilities specified in Section 1001. There is no corresponding language in Section 1064, which is the applicable section for highway carriers.

Sections 1701-1709 of the Code relate to requirements *if* a hearing is held. Therefore, cases construing those sections, such as *California Motor Transport Co. v. PUC*, 59 Cal.2d 270 (1963), are not relevant.

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Dated November 17, 1971.

CALIFORNIA MOTOR TRANSPORT CO. ET AL. *v.* TRUCKING UNLIMITED ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70–92. Argued November 10, 1971—Decided January 13, 1972

Respondent highway carriers filed this civil action under § 4 of the Clayton Act for injunctive relief and damages against petitioner highway carriers charging that petitioners conspired to monopolize the transportation of goods by instituting state and federal proceedings to resist and defeat applications by respondents to acquire, transfer, or register operating rights. Respondents alleged that the purpose of the conspiracy was "putting their competitors . . . out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, and of monopolizing the highway common carrier business in California and elsewhere," and deterring respondents from having free and unlimited access to the agencies and the courts. The District Court dismissed the complaint for failure to state a cause of action but the Court of Appeals reversed. *Held:* While any carrier has the right of access to administrative agencies and courts to defeat applications of competitors for certificates as highway carriers, and its purpose to eliminate an applicant as a competitor may be implicit in such opposition, its First Amendment rights are not immunized from regulation when they are used as an integral part of conduct violative of the antitrust laws. If the allegations that petitioners combined to harass and deter respondents from having "free and unlimited access" to agencies and courts, and to defeat that right by massive, concerted, and purposeful group activities are established as facts, a violation of the antitrust laws will have been demonstrated, and it is immaterial that the means used in violation may be lawful. Pp. 509–516.

432 F. 2d 755, affirmed and remanded for trial.

DOUGLAS, J., wrote the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed an opinion concurring in the result, in which BRENNAN, J., joined, *post*, p. 516. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Boris H. Lakusta argued the cause for petitioners. With him on the briefs were *W. D. Benson, John MacDonald Smith,* and *Daniel H. Benson.*

Michael N. Khourie argued the cause and filed a brief for respondents.

Dennis N. Garvey filed a brief for Landmarks Holding Corp. et al. as *amici curiae.*

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. CHIEF JUSTICE BURGER.

This is a civil suit under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, for injunctive relief and damages instituted by respondents who are highway carriers operating in California against petitioners who are also highway carriers operating within, into, and from California. Respondents and petitioners are, in other words, competitors. The charge is that the petitioners conspired to monopolize trade and commerce in the transportation of goods in violation of the antitrust laws. The conspiracy alleged is a concerted action by petitioners to institute state and federal proceedings to resist and defeat applications by respondents to acquire operating rights or to transfer or register those rights. These activities, it is alleged, extend to rehearings and to reviews or appeals from agency or court decisions on these matters.

The District Court dismissed the complaint for failure to state a cause of action, 1967 Trade Cas. ¶ 72,298. The Court of Appeals reversed, 432 F. 2d 755. The case is here on a petition for a writ of certiorari which we granted. 402 U. S. 1008.

The present case is akin to *Eastern Railroad Conference* v. *Noerr Motor Freight,* 365 U. S. 127, where a group of trucking companies sued a group of railroads to restrain them from an alleged conspiracy to monopolize

the long-distance freight business in violation of the antitrust laws and to obtain damages. We held that no cause of action was alleged insofar as it was predicated upon mere attempts to influence the legislative branch for the passage of laws or the executive branch for their enforcement. We rested our decision on two grounds:

> (1) "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Id.*, at 137.
>
> (2) "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.*, at 138.

We followed that view in *United Mine Workers* v. *Pennington*, 381 U. S. 657, 669–671.

The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. See *Johnson* v. *Avery*, 393 U. S. 483, 485; *Ex parte Hull*, 312 U. S. 546, 549.

We conclude that it would be destructive of rights of association and of petition to hold that groups with

common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors.

We said, however, in *Noerr* that there may be instances where the alleged conspiracy "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U. S., at 144.

In that connection the complaint in the present case alleged that the aim and purpose of the conspiracy was "putting their competitors, including plaintiff, out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, and of monopolizing the highway common carriage business in California and elsewhere."

More critical are other allegations, which are too lengthy to quote, and which elaborate on the "sham" theory by stating that the power, strategy, and resources of the petitioners were used to harass and deter respondents in their use of administrative and judicial proceedings so as to deny them "free and unlimited access" to those tribunals. The result, it is alleged, was that the machinery of the agencies and the courts was effectively closed to respondents, and petitioners indeed became "the regulators of the grants of rights, transfers and registrations" to respondents—thereby depleting and diminishing the value of the businesses of respondents and aggrandizing petitioners' economic and monopoly power. See Note, 57 Calif. L. Rev. 518 (1969).

Petitioners rely on our statement in *Pennington* that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." 381 U. S., at 670. In the present case, however,

the allegations are not that the conspirators sought "to influence public officials," but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process. It is alleged that petitioners "instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases." The nature of the views pressed does not, of course, determine whether First Amendment rights may be invoked; but they may bear upon a purpose to deprive the competitors of meaningful access to the agencies and courts. As stated in the opinion concurring in the result, such a purpose or intent, if shown, would be "to discourage and ultimately to prevent the respondents from invoking" the processes of the administrative agencies and courts and thus fall within the exception to *Noerr*.

The political campaign operated by the railroads in *Noerr* to obtain legislation crippling truckers employed deception and misrepresentation and unethical tactics. We said:

> "Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." 365 U. S., at 141.

Yet unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws, as we held in *Walker*

Process Equipment v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 175–177. Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 707; *Harman* v. *Valley National Bank*, 339 F. 2d 564 (CA9 1964). Similarly, bribery of a public purchasing agent may constitute a violation of § 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act. *Rangen, Inc.* v. *Sterling Nelson & Sons*, 351 F. 2d 851 (CA9 1965).

There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz.*, effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.

It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. *Giboney* v. *Empire Storage Co.*, 336 U. S. 490. In that case Missouri enacted a statute banning secondary boycotts and we sustained an injunction against picketing to enforce the boycott, saying:

> "It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." 336 U. S., at 502.

In *Associated Press* v. *United States*, 326 U. S. 1, we held that the Associated Press was not immune from the antitrust laws by reason of the fact that the press is under the shelter of the First Amendment. We said:

> "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the

> First Amendment does not sanction repression of that freedom by private interests." *Id.*, at 20.

Accord, *Citizen Publishing Co.* v. *United States,* 394 U. S. 131, 139–140. Cf. *Eastern States Lumber Association* v. *United States,* 234 U. S. 600.

The rationale of those cases, when applied to the instant controversy, makes the following conclusions clear: (1) that any carrier has the right of access to agencies and courts, within the limits, of course, of their prescribed procedures, in order to defeat applications of its competitors for certificates as highway carriers; and (2) that its purpose to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts may be implicit in that opposition.

First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" (see *NAACP* v. *Button,* 371 U. S. 415, 444) which the legislature has the power to control. Certainly the constitutionality of the antitrust laws is not open to debate. A combination of entrepreneurs to harass and deter their competitors from having "free and unlimited access" to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another. As stated in the opinion concurring in the result, that is the essence of those parts of the complaint to which we refer. If these facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful.

What the proof will show is not known, for the District Court granted the motion to dismiss the complaint. We must, of course, take the allegations of the complaint at face value for the purposes of that motion. *Walker*

Process Equipment v. *Food Machinery & Chemical Corp.*, 382 U. S., at 174–175. On their face the above-quoted allegations come within the "sham" exception in the *Noerr* case, as adapted to the adjudicatory process.

Accordingly we affirm the Court of Appeals and remand the case for trial.

So ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, concurring in the result.

In the *Noerr* case [1] this Court held, in a unanimous opinion written by Mr. Justice Black, that a conspiracy by railroads to influence legislative and executive action in order to destroy the competition of truckers in the long-haul freight business was wholly immune from the antitrust laws.[2] This conclusion, we held, was required in order to preserve the informed operation of governmental processes and to protect the right of petition guaranteed by the First Amendment.[3] Today the Court retreats from *Noerr*, and in the process tramples upon important First Amendment values. For that reason I cannot join the Court's opinion.

In *Noerr* the defendants were joined together in an effort to induce legislative and executive action. Here,

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[1] *Eastern Railroad Conference* v. *Noerr Motor Freight*, 365 U. S. 127.

[2] See also *United Mine Workers* v. *Pennington*, 381 U. S. 657, 669–671.

[3] This conclusion, the Court held, was a corollary of our decisions in *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, and *Parker* v. *Brown*, 317 U. S. 341, holding that when a monopoly or restraint of trade is the result of valid governmental action, there cannot be an antitrust violation.

so the complaint alleges, the defendants (petitioners) have joined to induce administrative and judicial action. The difference in type of governmental body might make a difference in the applicability of the antitrust laws if the petitioners had made misrepresentations of fact or law to these tribunals, or had engaged in perjury, or fraud, or bribery.[4] But, contrary to implications in the Court's opinion, there are in this case no allegations whatever of any such conduct on the part of the petitioners. And, in the absence of such conduct, I can see no difference, so far as the antitrust laws and the First Amendment are concerned, between trying to influence executive and legislative bodies and trying to influence administrative and judicial bodies. *NAACP* v. *Button*, 371 U. S. 415; *Brotherhood of Railroad Trainmen* v. *Virginia Bar*, 377 U. S. 1; *United Mine Workers* v. *Illinois State Bar Assn.*, 389 U. S. 217; *United Transportation Union* v. *State Bar of Michigan*, 401 U. S. 576.

The Court concedes that the petitioners' "right of access to the agencies and courts to be heard on applications sought by competitive highway carriers . . . is part of the right of petition protected by the First Amendment." Yet, says the Court, their joint agreement to exercise that right "does not necessarily give them immunity from the antitrust laws." *Ante*, at 513. It is difficult to imagine a statement more totally at odds with *Noerr*. For what that case explicitly held is that the joint exercise of the constitutional right of petition *is* given immunity from the antitrust laws.

While disagreeing with the Court's opinion, I would

[4] In *Noerr*, the Court emphasized that the defendants' "unethical" conduct did not affect their antitrust immunity for jointly exerting pressure on the legislative and executive branches, 365 U. S., at 141. See, however, *Walker Process Equipment* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172.

nonetheless remand this case to the District Court for trial. The complaint contains allegations that the petitioners have:

> "1. *Agreed* jointly to finance and to carry out and publicize a consistent, systematic and uninterrupted program of opposing 'with or without probable cause and regardless of the merits' every application, with insignificant exceptions, for additional operating rights or for the registration or transfer of operating rights, before the California PUC, the ICC, and the courts on appeal.
>
> "2. *Carried out* such agreement (a) by appearing as protestants in all proceedings instituted by plaintiffs and others in like position or by instituting complaints in opposition to applications or transfers or registrations; (b) by establishing a trust fund to finance the foregoing, consisting of contributions monthly in amounts proportionate to each defendant's annual gross income; (c) by publicizing and making known to plaintiffs and others in like position the foregoing program."

Under these allegations, liberally construed, the respondents are entitled to prove that the real *intent* of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately to prevent the respondents from invoking those processes. Such an intent would make the conspiracy "an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Eastern Railroad Conference* v. *Noerr Motor Freight*, 365 U. S., at 144.

It is only on this basis that I concur in the judgment of the Court.